

No. 91-471-CSX
Status: GRANTED

Title: Chemical Waste Management, Inc., Petitioner
v.
Guy Hunt, Governor of Alabama, et al.

Docketed:
September 20, 1991

Court: Supreme Court of Alabama

Counsel for petitioner: Pincus, Andrew J.

Counsel for respondent: Long, Jeffrey H., Nettles, Bert S.,
Coleman, William D., Hope, J. Wade, Wible, John R.

Entry	Date	Note	Proceedings and Orders
1	Jul 24 1991	D	Application (A91-81) for stay of certificates of judgment pending timely filing and disposition of petition for writ of certiorari, submitted to Justice Kennedy.
2	Jul 26 1991		(A91-81) Response to Application to Stay Certificates of Judgment, submitted to Justice Kennedy.
3	Jul 27 1991		Application (A91-81) denied by Justice Kennedy.
4	Sep 20 1991	G	Petition for writ of certiorari filed.
5	Oct 21 1991		Brief of respondents James Sizemore, et al. in opposition filed.
6	Oct 21 1991	G	Motion of American Iron and Steel Institute, et al. for leave to file a brief as amici curiae filed.
7	Oct 21 1991	G	Motion of Hazardous Waste Treatment Council, et al. for leave to file a brief as amici curiae filed.
10	Oct 22 1991		Brief of respondent Guy Hunt, Governor of Alabama in opposition filed.
8	Oct 23 1991		DISTRIBUTED. November 8, 1991
9	Oct 25 1991	X	Reply brief of petitioner Chemical Waste Management filed.
11	Oct 25 1991		Record filed.
		*	LODGING by petitioner
12	Nov 12 1991	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
15	Jan 7 1992	X	Brief amicus curiae of United States filed.
14	Jan 8 1992		REDISTRIBUTED. January 24, 1992
16	Jan 9 1992	X	Brief of respondent Guy Hunt, Governor of Alabama in reply to the amicus curiae brief of the United States filed.
17	Jan 16 1992	X	Supplemental brief of respondents James Sizemore, et al. in reply to the U.S. as amici curiae filed.
18	Jan 27 1992		Motion of American Iron and Steel Institute, et al. for leave to file a brief as amici curiae GRANTED.
19	Jan 27 1992		Motion of Hazardous Waste Treatment Council, et al. for leave to file a brief as amici curiae GRANTED.
20	Jan 27 1992		Petition GRANTED. limited to Question 1 presented by the petition.

21	Feb 11 1992		Record filed.
		*	Certified copy of proceedings Supreme Court of Alabama.
22	Mar 4 1992		SET FOR ARGUMENT TUESDAY, APRIL 21, 1992. (2ND CASE).
24	Mar 10 1992		Joint appendix filed.
25	Mar 10 1992		Brief of petitioner Chem. Waste Mgmt., Inc. filed.
23	Mar 11 1992		Brief amicus curiae of United States filed.
26	Mar 12 1992	X	Brief amici curiae of Hazardous Waste Treatment Council, et al. filed.

Entry	Date	Note	Proceedings and Orders
27	Mar 12 1992	X	Brief amicus curiae of American Trucking Associations, Inc. filed.
28	Mar 18 1992		CIRCULATED.
29	Mar 23 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
30	Mar 30 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
31	Apr 7 1992	X	Brief amicus curiae of State of New York filed.
33	Apr 8 1992	X	Brief of Governor of the State of Alabama, et al. filed.
32	Apr 9 1992	X	Brief of respondent James Sizemore filed.
38	Apr 9 1992	X	Brief amici curiae of National Governors Association, et al. filed.
39	Apr 9 1992	X	Brief amici curiae of Ohio, Kentucky, et al. filed.
37	Apr 10 1992	X	Brief amici curiae of South Carolina, et al. filed.
34	Apr 13 1992		LODGING by respondent. 12 copies of VanderVelde Transcript.
36	Apr 15 1992	X	Reply brief of petitioner Chemical Waste Management, Inc.(TBP) filed.
40	Apr 21 1992		ARGUED.

91-471
No.

Supreme Court, U.S.
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OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC., PETITIONER

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA;
ALABAMA DEPARTMENT OF REVENUE; AND
JAMES M. SIZEMORE, JR., COMMISSIONER OF THE
ALABAMA DEPARTMENT OF REVENUE, RESPONDENTS

**Petition for a Writ of Certiorari to the
Supreme Court of Alabama**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In April 1990, the State of Alabama adopted Act No. 90-326, a statute that taxes and otherwise regulates the disposal of hazardous waste within Alabama. Petitioner subsequently commenced this action challenging three provisions of the Act under the Commerce Clause. The questions presented are:

1. Whether a \$72 per ton disposal tax that on its face applies only to waste generated outside of Alabama violates the Commerce Clause.

2. Whether a \$25.60 per ton disposal tax that applies only to waste disposed of at "commercial" hazardous waste disposal facilities, and thereby exempts most of the hazardous waste generated and disposed of within Alabama, discriminates in its practical effect against out-of-state waste in violation of the Commerce Clause.

3. Whether a provision limiting the amount of waste that may be disposed of annually at a commercial hazardous waste disposal facility, which was motivated by an intention to reduce the amount of out-of-state waste disposed of in Alabama and is structured to achieve that purpose without substantially limiting the amount of in-state waste that may be disposed of in Alabama, violates the Commerce Clause.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Chemical Waste Management, Inc., states that its parent corporation is Waste Management, Inc. Chemical Waste Management, Inc.'s subsidiaries (other than wholly owned subsidiaries) are The Brand Companies, Inc. and Cemtech Management, Inc.

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GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA;
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JAMES M. SIZEMORE, JR., COMMISSIONER OF THE
ALABAMA DEPARTMENT OF REVENUE, RESPONDENTS

Petition for a Writ of Certiorari to the
Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

Chemical Waste Management, Inc., respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama (App., *infra*, 1a-49a) is not yet reported. The opinion of the Circuit Court of Montgomery County (App., *infra*, 50a-96a) is unreported.

JURISDICTION

The judgments of the Supreme Court of Alabama were entered on July 11, 1991. App., *infra*, 97a-101a. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Alabama Act No. 90-326 is reprinted at pages 102a-114a of the appendix to this petition.

STATEMENT

Petitioner Chemical Waste Management, Inc. ("CWM") operates a commercial hazardous waste disposal facility

located near the town of Emelle, Alabama ("the Emelle facility"), that is authorized to treat and dispose of hazardous waste under both federal and state law. Most of the waste disposed of at the Emelle facility is generated in other states and moves in interstate commerce to Alabama for treatment and/or disposal. The facility plays a critical role in the safe disposal of the Nation's hazardous waste. As the United States has observed, "Emelle is important from a nationwide perspective because it is the largest hazardous waste management facility in the United States and the ultimate depository for over one third of the waste materials shipped off-site from Superfund [cleanup] sites." Brief for the United States at 9, *National Solid Wastes Management Ass'n v. Alabama Dep't of Environmental Management* ("NSWMA"), 910 F.2d 713 (11th Cir. 1990), modified, 924 F.2d 1001, cert. denied, 111 S. Ct. 2800 (1991).

For the last three years, the State of Alabama has tried to prevent the disposal at the Emelle facility of waste generated in other states. Alabama's efforts repeatedly have been rebuffed by the courts—until now. The State's latest assault on non-Alabama waste, Act No. 90-326, furthers its purpose through three different provisions: one that facially discriminates against interstate waste, one that discriminates in practical effect, and a third that incorporates both types of discrimination. Remarkably, the Alabama Supreme Court held that Act No. 90-326 nonetheless complies with the Commerce Clause in all respects. This petition seeks review of that unprecedented interpretation of the Commerce Clause.

1. *Regulatory Background.* Disposal of hazardous waste is strictly regulated under federal law. The Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*, and the regulations promulgated by the Environmental Protection Agency ("EPA") pursuant to that statute (see 40 C.F.R. Parts 260-271), impose elaborate requirements for the safe handling and disposal of hazardous waste. See *Alabama v. United States Environmental Protection Agency*, 871 F.2d 1548,

1552 (11th Cir.), cert. denied, 110 S. Ct. 538 (1989) (citations omitted). RCRA provides that all operators of hazardous waste treatment, storage, or disposal facilities must obtain permits fixing the terms on which the operator may engage in those activities. 42 U.S.C. § 6925.

Federal law recognizes that hazardous waste is an unavoidable byproduct of virtually all industrial processes and that some hazardous waste must be disposed of in landfills. Congress in 1984 specified that land disposal of hazardous waste would be permitted only after such waste is treated with the "best available demonstrated technology," or in compliance with the applicable treatment standard, in order to reduce the waste's toxicity and mobility. 42 U.S.C. § 6924. The EPA has promulgated regulations setting forth these technological requirements. See generally 40 C.F.R. Part 268; 55 Fed. Reg. 22520, 22523 (1990).

Moreover, federal law provides that the operator of a hazardous waste disposal facility is responsible for ensuring the containment of waste disposed of at that site. 40 C.F.R. § 264.110-264.120; see also 42 U.S.C. § 9607. In addition, the operator must provide "financial assurances" demonstrating the availability of funds to cover the closure of the facility and post-closure care for 30 years as well as liability insurance for injuries to third parties. 40 C.F.R. § 264.140-264.147. Finally, in the event the foregoing resources prove inadequate, generators, brokers, and transporters of the waste disposed of at a hazardous waste disposal facility are jointly and severally liable for the costs of remedial action if there is a release from such a facility. 42 U.S.C. § 9607.

Federal law also comprehensively regulates the transportation of hazardous materials. See 49 U.S.C. App. §§ 1801-1819; 49 C.F.R. Parts 171-180 (1990). Among other things, these provisions require transporters of hazardous materials to register with and obtain safety permits from the Secretary of Transportation (49 U.S.C. App. § 1805) and specify procedures for minimizing the

risk of and for redressing spills in transit. See 49 C.F.R. §§ 173.300, 173.510, 177.834, 177.854-177.860; *id.* Part 178. In addition, federal law requires transporters of hazardous materials to demonstrate financial responsibility of at least \$5 million to cover the cost of remediating any spill of such materials that may occur in transit. Pub. L. No. 101-615, § 23, 104 Stat. 3244, 3272 (1990).

2. *The Emelle Facility.* CWM's Emelle facility has received a RCRA permit from the EPA, as well as a separate permit—issued by the EPA pursuant to the Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.*—authorizing the disposal of polychlorinated biphenyls (“PCBs”) at the facility.¹ These permits establish that the Emelle facility “has complied with elaborate federal regulations designed to ensure the safe disposal of hazardous wastes * * *. To the extent these federal regulations can and do provide for the safe treatment and disposal of toxic wastes, CWM's Emelle, Alabama, facility poses no threat to the health and safety of the residents of Emelle or to other Alabama residents.” *Alabama*, 871 F.2d at 1552-1553. Indeed, Governor Hunt has characterized the Emelle facility as “probably one of the safest such facilities in the country.” Pl. Exh. 80.

The Emelle facility is a “commercial” hazardous waste disposal facility under Alabama law because it is “[a] site or facility receiving hazardous waste or hazardous substances * * * not generated on site, for disposal and to which a fee is paid or other consideration given for such disposal.” Ala. Code § 22-30B-1(1). A substantial amount of the waste disposed of at the Emelle facility is generated in states other than Alabama and moves in interstate commerce to the Emelle facility. The trial court found that “[e]ighty-five to ninety percent of the

¹ The Emelle facility also is regulated under Alabama law. Currently, the facility is authorized to operate pursuant to the interim status procedures set forth in Ala. Code. § 22-30-12(i).

tonnage permanently buried at Emelle is from out-of-state.” App., *infra*, 58a.

Hazardous waste is also disposed of within Alabama at facilities that do not qualify as “commercial,” either because the waste is generated on site or because a fee is not charged for disposal. Virtually all of the hazardous waste disposed of at such facilities is generated within Alabama. Moreover, this waste accounts for a very substantial percentage of all of the Alabama-generated waste that is disposed of within the State.²

3. *Alabama's Efforts To Impede The Disposal In Alabama Of Waste Generated In Other States.* Over the past several years, Alabama repeatedly has sought to prevent the disposal within the State of hazardous waste generated in other states. In 1988 the State filed suit in an effort to halt the cleanup of an abandoned hazardous waste site in Texas because the waste was to be disposed of at the Emelle facility. This effort to stop the flow of waste at the State's borders was rebuffed by the Eleventh Circuit. Though dismissing the case on standing and jurisdictional grounds, that court admonished that “[t]o the extent plaintiffs * * * assert injury based on the out-of-state nature of these wastes, the Supreme Court has already held that the commerce clause bars such a distinction.” *Alabama*, 871 F.2d at 1555 n.3.

Alabama's next attempt to thwart the movement of waste in interstate commerce was the enactment of Ala.

² In 1987—the most recent year for which data are available—over 3 million tons of hazardous waste were generated in Alabama. Pl. Exh. 27, at 44. Of that total, less than 30,000 tons were disposed of in commercial landfills. Robertson Dep. 155-158. About 7,500 tons were disposed of in noncommercial landfills (Pl. Exh. 27, at 62) and 690,000 tons were disposed of in noncommercial surface impoundments (*id.* at 64). Another 57,000 tons were shipped out of state for management and disposal. *Id.* at 46. Over 90% of the remaining 2.2 million tons of in-state waste was treated or stored in noncommercial surface impoundments and waste piles. *Id.* at 52, 53, 56. Those forms of treatment and storage come within Alabama's broad definition of “disposal.” See page 19, *infra*.

Act No. 89-788 (codified at Ala. Code § 22-30-11(b)) in May 1989. That measure, popularly known as the Holley Bill, barred any commercial hazardous waste disposal facility located in Alabama from treating or disposing of hazardous waste generated outside Alabama if the state in which the waste was generated did not satisfy certain criteria specified by Alabama. Finding that the Holley Bill "distinguish[ed] among wastes based on their origin, with no other basis for the distinction," the Eleventh Circuit held that the Holley Bill violated the Commerce Clause. *NSWMA*, 910 F.2d at 720.

4. *The Challenged Statute.* In 1990, Alabama continued its assault on out-of-state waste by enacting Ala. Act. No. 90-326 (codified at Ala. Code § 22-30B-1.1 *et seq.*), the statute at issue in this case. The Act imposes two fees on the disposal of waste at commercial hazardous waste disposal facilities in Alabama. First, it levies a fee of \$25.60 per ton ("the Base Fee") on all waste disposed of at such facilities. Second, the Act imposes a separate fee of \$72 per ton ("the Additional Fee") expressly limited to waste generated outside Alabama and disposed of at such facilities. See Ala. Code § 22-30B-2. The Act also contains a provision that restricts the amount of waste that can be disposed of at commercial hazardous waste disposal facilities during any one-year period ("the Cap Provision"). The cap was fixed at the amount of waste received at such facilities during the year beginning July 15, 1990—the day the new fees took effect. See *id.* § 22-30B-2.3. The annual limit may be exceeded if necessary "to protect human health or the environment in the state, or to allow the state to comply with its obligations to assure disposal capacity pursuant to applicable state or federal law." *Ibid.*

When Governor Hunt signed Act No. 90-326 into law, he stated:

On the day I took office just over three years ago, toxic waste producers in other states could drive their problems to Alabama and dump them for only \$6 a

ton. But today, Alabama is taking down the sale sign. With this law it's going to cost \$112 a ton to bring hazardous waste into Alabama from other states. Let the message go out. There are no more environmental bargains to be found here.

Pl. Exh. 80.³ Other state officials made similar pronouncements during the legislature's consideration of this statute. See, *e.g.*, Pegues Dep. 32-33 (Director of the Alabama Department of Environmental Management ("ADEM")).

5. *The Decisions Below.* In May 1990, CWM commenced this action in Alabama circuit court challenging Act No. 90-326 on federal and state constitutional grounds. Following a trial, the circuit court held that the \$72 Additional Fee violated the Commerce Clause, but rejected CWM's challenges to the Base Fee and Cap Provision.

The circuit court found that "the Additional Fee facially discriminates against waste generated in States other than Alabama * * *. Waste generated within Alabama * * * is completely exempted from the Additional Fee." App., *infra*, 85a (emphasis in original). The court rejected the State's proffered environmental and safety justifications for singling out waste from other States:

[H]azardous waste generated in Alabama is just as dangerous as such waste generated in other states. All of the safety and environmental concerns set forth at trial * * * apply with equal force to hazardous waste generated in and out of the State of Alabama. * * * This Court finds that the record contains no evidence of any difference between in-state waste and out-of-state waste other than the waste's state of origin.

Id. at 86a.

³ The taxes levied on interstate waste by Act No. 90-326 totalled \$97.60 per ton; other provisions imposed additional exactions amounting to \$14.40 per ton.

The court also concluded that the Additional Fee could not be justified on the ground that it imposes on out-of-state waste generators their fair share of the costs to Alabama of waste disposal facilities located within the State. The court found insufficient evidence that in-state generators bore a disproportionate share of these costs prior to the enactment of the Additional Fee and no evidence that the Fee equalized the burden on in-state and out-of-state generators. App., *infra*, 88a n.6. Accordingly, the court concluded that the Additional Fee violates the Commerce Clause.

The court reached a different conclusion with respect to the Base Fee. It began by stating that strict scrutiny is required under the Commerce Clause only if the challenged regulation is "discriminatory on its face or in practical effect." App., *infra*, 65a. According to the court, "any evidence attributing to any state officials any motive of discrimination against interstate commerce" is "irrelevant" to the level of scrutiny required. *Id.* at 66a n.1.

The court then stated that the Base Fee does not discriminate against out-of-state waste on its face or in its practical operation. App., *infra*, 66a. It therefore upheld the Base Fee under the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), concluding that "the burden the Base Fee imposes on interstate commerce is not clearly excessive in relation to the benefits it produces" (App., *infra*, 67a).

The circuit court used an identical analysis in assessing the validity of the Cap Provision. Ignoring the fact that the exception to the annual limit is available only for Alabama waste, the court stated that "[t]he Cap provision applies equally to in-state and out-of-state waste." App., *infra*, 72a. Accordingly, it again applied the *Pike* balancing test and upheld the provision.

The Alabama Supreme Court affirmed the circuit court's decision—and adopted its opinion—with respect to the Base Fee and Cap Provision. See App., *infra*, 17a-37a. However, it reversed the circuit court's ruling that the

Additional Fee is unconstitutional. According to the state supreme court, this Court's decisions "make a distinction between state measures that discriminate arbitrarily against out-of-state commerce in order to give in-state interests a commercial advantage, i.e., simple economic protectionism, and state measures that seek to protect public health or safety or the environment." *Id.* at 41a. The court found that the Additional Fee differed from the facially discriminatory bans on out-of-state waste invalidated in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), and *NSWMA* because it "has not been enacted for the purpose of economic protectionism." *Id.* at 44a. Based on the asserted inapplicability of those decisions, the court determined that the Additional Fee

serves these legitimate local purposes that cannot be adequately served by reasonable nondiscriminatory alternatives: (1) protection of the health and safety of the citizens of Alabama from toxic substances; (2) conservation of the environment and the state's natural resources; (3) provision for compensatory revenue for the costs and burdens that out-of-state waste generators impose by dumping their hazardous waste in Alabama; (4) reduction of the overall flow of wastes traveling on the state's highways, which flow creates a great risk to the health and safety of the state's citizens.

Ibid.

The state supreme court concluded that "[t]here is nothing in the Commerce Clause that compels the State of Alabama to yield its total capacity for hazardous waste disposal to other states. To tax Alabama-generated hazardous waste at the same rate as out-of-state waste is not an available nondiscriminatory alternative, because Alabama is bearing a grossly disproportionate share of the burdens of hazardous waste disposal for the entire country." App., *infra*, 45a-46a.⁴

⁴ Justice Houston concurred in the judgment, concluding that hazardous waste should not be treated as an article of commerce protected by the Commerce Clause. App., *infra*, 48a-49a.

REASONS FOR GRANTING THE PETITION

The Framers of our Constitution sought to avoid the commercial rivalries among states that festered under the Articles of Confederation by mandating economic as well as political union. The Framers recognized that the states were in fact economically interdependent and that the Nation would therefore be strongest without artificial barriers obstructing commerce among the states. The Commerce Clause fosters this ideal by prohibiting the states from discriminating in favor of their own goods and against those originating in other states and from seeking to reserve privately-owned resources for their own citizens.

The statutory provisions at issue here, and the Alabama Supreme Court's decision upholding them, comprise nothing less than a frontal assault on these basic Commerce Clause principles. The notion that Alabama may in effect erect an "interstate waste keep out" sign at the Emelle facility, and reserve CWM's waste disposal capacity solely for Alabamians, reflects the very focus on parochial state interests—rather than national interests—that the Framers sought to eradicate. This Court should grant the petition for certiorari to correct the erroneous decision of the court below and to ensure that the Commerce Clause continues to serve its intended function.

I. THE ALABAMA SUPREME COURT'S DECISION UPHOLDING THE FACIALLY DISCRIMINATORY \$72 ADDITIONAL FEE CONFLICTS WITH THIS COURT'S PRECEDENTS ON A QUESTION OF GREAT IMPORTANCE.

The decision below upholding the facially discriminatory \$72 tax on interstate waste rests on a clear misapplication of this Court's decision in *City of Philadelphia v. New Jersey*, *supra*, which held that a state may not discriminate against waste solely on the basis of its origin. Indeed, the Alabama Supreme Court's conclusion that the strictures of the Commerce Clause do not apply if a state legislature acts for noneconomic reasons was

expressly rejected in *City of Philadelphia* itself. And other lower courts have consistently applied the *City of Philadelphia* rule regardless of the subjective motivation underlying the facially discriminatory statute. This Court should grant review to resolve the conflict among the lower courts and correct the Alabama Supreme Court's error regarding this question of substantial public importance.

A. This Court's Decisions Make Clear That The \$72 Tax Violates The Commerce Clause.

Well-established principles govern analysis under the Commerce Clause of a state law that discriminates on its face against interstate commerce. Facial discrimination against interstate commerce "by itself may be a fatal defect, regardless of the State's purpose." *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979). To the extent facial discrimination is not *per se* unconstitutional, the state's burden of justification is "high": the discriminatory statute must be invalidated unless the state can show that the law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988). A court must engage in "the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory motives." *Hughes*, 441 U.S. at 337.

This Court has applied this standard in the precise context presented here—a statute that discriminates on its face against waste generated in other states. In *City of Philadelphia*, the Court held invalid under the Commerce Clause a New Jersey statute that barred the disposal within that state of waste generated in other states while permitting disposal of New Jersey waste. The Court explained that the Commerce Clause prevented New Jersey from "discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." 437 U.S. at 626-627.

The Court stated that "[t]he harms caused by waste are said to arise after its disposal in landfill sites, and at that point, as New Jersey concedes, there is no basis to distinguish out-of-state waste from domestic waste. If one is inherently harmful, so is the other. Yet New Jersey has banned the former while leaving its landfill sites open to the latter." 437 U.S. at 629. The statute thus was "an obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse into New Jersey's remaining landfill sites. That legislative effort is clearly impermissible under the Commerce Clause." *Ibid.*

The \$72 Additional Fee is indistinguishable from the statute held invalid in *City of Philadelphia*: it discriminates against out-of-state waste precisely because of the waste's state of origin. There can be no dispute that the purpose and effect of the Additional Fee are to discourage the disposal within Alabama of waste generated in other states, while exempting from that burden waste generated within Alabama. That is precisely what *City of Philadelphia* forbids.

The Alabama Supreme Court refused to apply *City of Philadelphia*'s anti-discrimination principle to the Additional Fee. It reasoned: "*City of Philadelphia v. New Jersey* does not hold that a state may not limit importation of wastes to protect health and the environment; it holds that a state may not do so for 'simple economic protectionism.'" App., *infra*, 42a.

This Court's decisions, however, expressly and conclusively reject the Alabama Supreme Court's "distinction" based on subjective legislative motivation. For example, in *City of Philadelphia* itself, New Jersey "den[ied] that [its statute] was motivated by financial concerns or economic protectionism" and contended that it was designed "to protect the health, safety and welfare of the citizenry at large." 437 U.S. at 626 (citation omitted). The Court found New Jersey's actual motive irrelevant, stating:

[I]t does not matter whether the ultimate aim of [the statute] is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. * * * But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.

Id. at 626-627. The Court has reiterated this point on several occasions. See, e.g., *New Energy*, 486 U.S. at 279 n.3 (even if state legislature was motivated by a subjective purpose to protect public health, that purpose was "inadequate to validate patent discrimination against interstate commerce"); *Maine v. Taylor*, 477 U.S. 131, 148-149 n.19 (1986) (the *City of Philadelphia* standard applies "not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade").⁵ Thus, the decision below simply cannot be reconciled with *City of Philadelphia*.

The Alabama Supreme Court's unjustifiably narrow understanding of *City of Philadelphia*'s nondiscrimination principle incurably infects its conclusion (App., *infra*, 44a) that the Additional Fee promotes four legitimate purposes that could not be adequately served through less discriminatory means. To begin with, because the circuit court found (and the state supreme court did not dispute) that "hazardous waste generated in Alabama is just as dangerous as such waste generated in other states" (*id.* at

⁵ The Alabama Supreme Court stated (App., *infra*, 42a) that *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), supported its reading of *City of Philadelphia*. In fact, that decision reaffirmed *City of Philadelphia*'s conclusion that "[a] court may find that a state law constitutes 'economic protectionism' on proof either of discriminatory effect or of discriminatory purpose." 449 U.S. at 471 & n.15 (citation omitted; emphasis added).

86a), the State's health and safety justification plainly can be served as well—if not better—by a nondiscriminatory per-ton tax applicable to *all* waste disposed of within Alabama. *City of Philadelphia*, 437 U.S. at 629; accord *New Energy Co.*, 486 U.S. at 279.⁶

Alabama's goal of conserving landfill space also may be achieved through an even-handed tax on all landfilled waste regardless of origin. See *City of Philadelphia*, 437 U.S. at 627 ("a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders"). Similarly, Alabama's concern about transportation risks can be addressed as well or better by means of a nondiscriminatory tax on the transportation of hazardous materials on Alabama roads. See *American Trucking Ass'ns, Inc. v. Secretary of State*, 1991 Me. Lexis 148 (Me. June 17, 1991); *Illinois v. General Electric Co.*, 683 F.2d 206, 214 (7th Cir. 1982), cert. denied, 461 U.S. 913 (1983).

Finally, it is undisputed that any costs and burdens that Alabama might be forced to incur some time in the fu-

⁶The court below relied (App., *infra*, 43a-44a) on *Maine v. Taylor*, *supra*, which involved a Maine statute that banned the importation of out-of-state baitfish. This Court measured the constitutionality of the statute under the strict scrutiny standard applicable to laws that discriminate against interstate commerce. It upheld the statute only because Maine had "legitimate reasons, 'apart from their origin, to treat [out-of-state baitfish] differently.'" *Id.* at 152 (quoting *City of Philadelphia*, 437 U.S. at 627). The out-of-state baitfish had a physical characteristic—the presence of a parasite—that was "not common to wild fish in Maine" and, in addition, shipments of out-of-state baitfish could include non-Maine species that "could disturb Maine's aquatic ecology to an unpredictable extent." 477 U.S. at 141. The State proved that no measure short of a complete ban would allow the State effectively to protect its delicate ecological balance. *Taylor* thus rested squarely on this Court's determination that the record in that case established that out-of-state baitfish were in fact different from and posed a substantially different threat to the environment than in-state baitfish. *Taylor* is inapplicable here because there is no such difference between a ton of Alabama waste and a ton of waste generated in other states.

ture as a result of a ton of hazardous waste that is disposed of today will not vary depending on the waste's state of origin. See Tr. 364 (testimony of ADEM official Sue Robertson). Accordingly, the State's desire to provide a financial safeguard against the assertedly uncertain future costs and burdens associated with the present disposal of hazardous waste—to the extent such a safeguard is necessary or even appropriate given the federal protections already in place (see pages 2-5, *supra*)—plainly can be satisfied through nondiscriminatory taxation or regulation of all hazardous waste disposed of in Alabama.⁷

In sum, the unconstitutionality of the Additional Fee is clear under this Court's settled Commerce Clause jurisprudence.

B. The Decision Below Squarely Conflicts With Those Of Other Lower Courts Invalidating Statutes That Facially Discriminate Against Out-of-State Waste.

The Alabama Supreme Court's decision creates a square conflict among the lower courts concerning the constitutionality of state statutes that facially discriminate against waste generated out-of-state. Prior to the decision below, four federal courts of appeals, relying on *City of Philadelphia*, had held such statutes invalid under the Commerce Clause. See *NSWMA, supra*; *Washington State Building & Construction Trades Council v. Spellman*, 684

⁷In fact, the Additional Fee does not provide a safeguard of any kind because the revenues are not set aside in an environmental emergency fund, but instead are "deposited into the general budgetary fund of the state to be used for general operations * * *." Ala. Code § 22-30B-3.

Moreover, to the extent the court below believed that the Additional Fee compensated for other taxes paid by in-state generators of hazardous waste, it erred by failing to analyze the fee under the "compensatory tax" doctrine. This Court has made clear that the doctrine applies only if the tax on interstate activity merely counterbalances a "substantially equivalent" tax on intrastate activity. See, e.g., *Maryland v. Louisiana*, 451 U.S. 725, 759 (1981). Alabama never has identified a tax that falls exclusively on in-state waste and is "substantially equivalent" to the Additional Fee.

F.2d 627 (9th Cir. 1982), cert. denied, 461 U.S. 913 (1983); *General Electric Co.*, 683 F.2d at 213-214; *Hardage v. Atkins*, 582 F.2d 1264, 1266 (10th Cir. 1978).⁸

The reasoning employed by the Alabama Supreme Court is directly contrary to these decisions. For example, the Eleventh Circuit concluded in *NSWMA* that absent proof that out-of-state waste differs from waste generated in Alabama "on the basis of type of waste or degree of dangerousness," Alabama could not subject out-of-state waste to stricter regulation. 910 F.2d at 721. See also *Spellman*, 684 F.2d at 631 ("[t]he State of Washington neglects to address * * * the manner in which local waste, transported and stored within Washington has superior safety and environmental virtues over waste produced elsewhere and similarly controlled by state regulatory measures"). The circuit court applied the same standard in the present case. App., *infra*, 85a-86a. The Alabama Supreme Court, on the other hand, upheld the facially discriminatory statute even though it did not dispute the circuit court's finding that there was no qualitative distinction between waste generated within Alabama and waste generated in other states.

Moreover, these federal courts have applied *City of Philadelphia* without regard to subjective motivation underlying the discriminatory statute. Indeed, the Eleventh Circuit expressly concluded in *NSWMA* that the statute there at issue was an "honorable and well intentioned" attempt to "com[e] to grips with environmental problems" (910 F.2d at 725), but nonetheless struck it down

⁸ A number of federal district courts have reached the same conclusion. See *Chemical Waste Management, Inc. v. Templet*, 1991 U.S. Dist. Lexis 9492 (M.D. La. July 9, 1991); *National Solid Waste Management Ass'n v. Voinovich*, 763 F. Supp. 244 (S.D. Ohio 1991), appeal pending, No. 91-3466 (6th Cir.); *Hazardous Waste Treatment Council v. South Carolina*, 32 E.R.C. 1646 (D.S.C. 1991), appeal pending, No. 91-2317 (4th Cir.); *Government Suppliers Consolidating Servs. v. Bayh*, 753 F. Supp. 739 (S.D. Ind. 1990); *Industrial Maintenance Serv. v. Moore*, 677 F. Supp. 436 (S.D. W. Va. 1987).

under *City of Philadelphia*. *Id.* at 721.⁹ Accord *General Electric Co.*, 683 F.2d at 213. The Alabama Supreme Court's decision thus conflicts with the cited court of appeals decisions in approach as well as in result.

The conflict between the Alabama Supreme Court and the Eleventh Circuit is particularly unacceptable because of the effects of the Tax Injunction Act, 28 U.S.C. § 1341, which requires that most challenges to tax statutes be brought in state court. As a result of the Alabama Supreme Court's anomalous decision, one Commerce Clause standard will apply to Alabama's non-tax measures, which may be challenged in federal court, while a conflicting rule will apply to discriminatory Alabama taxes, which may be challenged only in state court. The Court should grant certiorari to eliminate this double standard.

Finally, review is warranted because this issue arises with considerable frequency. A number of states have adopted laws and regulations that facially discriminate against interstate commerce in waste; Commerce Clause challenges are currently pending against the laws and regulations of six such states. *National Solid Waste Management Ass'n v. Voinovich*, *supra*; *Hazardous Waste Treatment Council v. South Carolina*, *supra*; *National Solid Wastes Management Ass'n v. Jorling*, Civ-90-1288A (W.D.N.Y.); *Empire Sanitary Landfill, Inc. v. Pennsylvania*, No. 90-187-W (Pa. Env'tl. Hearing Bd.); *Gilliam County v. Department of Environmental Quality*, No. A68441 (Or. Ct. App.). The decision below could affect the resolution of these cases and might prompt additional states to enact discriminatory barriers to the interstate

⁹ The Alabama Supreme Court suggested (App., *infra*, 40a-41a) that the Eleventh Circuit's decision was distinguishable because the Additional Fee "has specifically been found by the legislature to be an effective way to deal with health and environmental hazards to Alabamians created by hazardous waste imported here from other states." In fact, however, the legislative findings accompanying the statute invalidated by the Eleventh Circuit clearly reflect the very same concerns that motivated Act No. 90-326. See Alabama Act No. 89-788, Section 1(9)-1(14).

movement of waste. This Court should grant certiorari and reaffirm that the Commerce Clause prohibits this kind of discriminatory legislation.

II. THE ALABAMA SUPREME COURT'S DECISION UPHOLDING THE \$25.60 BASE FEE CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS ON RECURRING ISSUES CENTRAL TO THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE.

Alabama did not rely solely on express discrimination against interstate commerce to achieve its goal of obstructing the disposal of out-of-state waste in Alabama. The \$25.60 per ton Base Fee—though facially neutral—also furthers the State's discriminatory plan.

The Base Fee applies only to waste disposed of at "commercial" hazardous waste disposal facilities; it exempts waste disposed of at all other facilities—*i.e.*, facilities that dispose of waste generated on site or that do not charge a disposal fee. It is undisputed that essentially all out-of-state hazardous waste shipped to Alabama for disposal is disposed of at a commercial hazardous waste disposal facility (principally the Emelle facility) and therefore is subject to the Base Fee. At the same time, virtually all of the hazardous waste that is disposed of at other disposal facilities—and hence is exempt from the Base Fee—is generated within Alabama. This exempt waste makes up most of the Alabama-generated hazardous waste disposed of within the State. See page 5 & n.2, *supra*.

By carving out a substantial exemption from the tax that, as a practical matter, is available only to Alabama-generated waste, Alabama has succeeded in applying the tax to virtually *all* interstate waste disposed of within the State, but to only a small percentage of Alabama-generated waste. The use of "commercial" as a proxy for "out-of-state" thus ensures that the economic burden of the tax is borne disproportionately by interstate commerce.

Certainly there is nothing inherent in the nature of a waste disposal tax that justifies the distinction that Alabama has drawn. Act No. 90-326 taxes "disposal," which it defines broadly as:

[t]he discharge, deposit, injection, dumping, spilling, incineration, leaking or placing of any waste or substance into or on any land or water so that such waste or substance or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters including groundwaters
* * *

Ala. Code § 22-30B-1(2). This definition encompasses the landfilling of hazardous waste, as well as certain forms of treatment or storage—*e.g.*, methods utilizing surface impoundments or waste piles. The definition thus recognizes that it is the character of the waste and the means by which it is disposed of, treated, or stored—not the type of facility at which these management activities take place—that is relevant to the State's putative health and safety purposes. Those purposes would be implicated equally by every single ton of hazardous waste "discharge[d], deposit[ed] * * * or plac[ed]" on land or water in Alabama regardless of whether the facility doing so is "commercial."¹⁰ Targeting "commercial" facilities alone serves no purpose other than conferring an advantage on politically powerful in-state generators of hazardous waste.¹¹

¹⁰ Indeed, witnesses for both sides testified that the Emelle facility is better designed, and generally *less* likely to cause harm to public health or the environment, than the facilities not covered by the tax. Tr. 396 (Robertson); Henson Dep. 66; Brumond Dep. 279-281.

¹¹ The Alabama Supreme Court, in rejecting CWM's equal protection challenge to the Base Fee, offered several justifications for the distinction between "commercial" facilities and other facilities. Principally, it asserted that the distinction is justified by the risk inherent in the transportation of waste. App. *infra*, 23a-24a. But the tax does not single out waste that is transported in Alabama: waste generated on-site at the Emelle facility is taxed even though it is *not* transported, while waste transported for disposal at other

This is not the first time that a case has reached this Court involving a state statute crafted on the basis of industry characteristics that serve as proxies for distinguishing interstate commerce from intrastate commerce. In *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990), Florida had first enacted a tax statute expressly exempting beverages made from "Florida-grown" crops. After this Court struck down a similar statute in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the State substituted a law that deleted the references to "Florida-grown" and "replaced them with special rate reductions for certain specified citrus, grape, and sugarcane products, all of which are commonly grown in Florida and used in alcoholic beverages produced there." 110 S. Ct. at 2243 (footnote omitted). The statute no longer facially discriminated against interstate commerce, but—because the specified beverages were produced disproportionately within Florida and therefore served as a proxy for intrastate commerce—it discriminated just as effectively against interstate commerce in its practical operation. The Florida Supreme Court held that the statute therefore violated the Commerce Clause. That holding was not disputed before this Court, which observed that the Florida Supreme Court's decision "rested on established principles of Commerce Clause jurisprudence." *Id.* at 2247 n.15.

facilities is not taxed (as long as no disposal fee is charged). The court also stated (*ibid.*) that commercial facilities pose special problems because they accumulate greater amounts of waste than other facilities. Yet a *per-ton* tax on waste already takes this asserted fact fully into account. Finally, the court observed (*id.* at 24a) that the State need not treat commercial and noncommercial activities the same for tax purposes. While that observation may be true as a general matter, it is irrelevant where the taxed activity is *disposal*, not sales. In any event, even if any of the court's justifications for the State's distinction suffices to meet the lenient rational basis test applied under the Equal Protection Clause, all plainly fall far short of justifying discrimination against interstate commerce.

The Base Fee has a discriminatory effect that is indistinguishable from that of the statute struck down in *McKesson*. The Alabama Supreme Court's decision upholding the Base Fee in spite of that effect thus conflicts with *McKesson* (as well as the decisions of several other state and federal courts) and diverges sharply from this Court's precedents. Review of that decision is plainly warranted.

A. The Base Fee Discriminates Against Interstate Commerce In Violation Of The Commerce Clause.

1. This Court has made clear on numerous occasions that a state law must be assessed under the strict standard applicable to facially discriminatory statutes if it discriminates against interstate commerce in its practical operation. See, *e.g.*, *Amerada Hess Corp. v. Director, Division of Taxation*, 490 U.S. 66, 75, 76 (1989); *American Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266, 286 (1987); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350-353 (1977); *Nippert v. City of Richmond*, 327 U.S. 416, 431 (1946); *Best & Co. v. Maxwell*, 311 U.S. 454, 456 (1940). The fact that the law might be facially neutral is not dispositive of the constitutional inquiry because "[t]he commerce clause forbids discrimination, whether forthright or ingenious." *Best & Co.*, 311 U.S. at 455.

Thus, the Court has condemned facially neutral statutes that effect "ingenious" discrimination in a multitude of contexts. For example, it repeatedly has struck down facially neutral taxes on persons soliciting orders for merchandise. Such taxes, as a practical matter, fall more heavily on out-of-state businesses, which, unlike their local competitors, may find it economically infeasible to maintain a regular retail outlet in the taxing jurisdiction and therefore have to employ solicitors to reach customers there. See, *e.g.*, *Nippert, supra*; *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489 (1887). The Court also has invalidated flat truck taxes because the effect of such taxes is to impose a heavier per-mile cost on trucks

engaged in interstate operations than on trucks engaged in intrastate operations. See *Scheiner*, 483 U.S. at 284-286. And it has struck down a requirement that apples bear the applicable federal grade rather than a state grade because the effect of that requirement was to eliminate the competitive advantage enjoyed by producers of apples from other states with stricter grading systems. *Hunt*, 432 U.S. at 351-352.

As we have discussed (see page 18, *supra*), the Base Fee is gerrymandered to reach virtually all interstate commerce, while exempting as much intrastate commerce as possible. That discriminatory effect requires that the constitutionality of the Base Fee be determined under the strict scrutiny test.

Any doubt about the necessity of strict scrutiny review here is eliminated by the strong evidence of the State's discriminatory intent. As the Third Circuit has observed, it may sometimes be difficult to determine whether a facially neutral statute that imposes disproportionate burdens on interstate commerce should be analyzed under the strict scrutiny test or the *Pike* balancing test. Where there is evidence of discriminatory motive and discriminatory effect, however, there can be no doubt that strict scrutiny is warranted. *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 400-401 & n.18 (3d Cir. 1987). In *Hunt*, for example, this Court discussed evidence of the State's discriminatory motive to bolster its conclusion that the statute discriminated in effect against interstate commerce (432 U.S. at 352).¹²

Here, there is abundant evidence of discriminatory intent. The entire purpose of Act No. 90-326 was to obstruct interstate commerce in waste. See pages 6-7, *supra*.

¹² Indeed, this Court repeatedly has stated that evidence that a law was motivated by an intent to discriminate against interstate commerce is *by itself* sufficient to trigger strict scrutiny under the Commerce Clause. See, e.g., *Amerasia Hess*, 490 U.S. at 75, 76; *Bacchus Imports*, 468 U.S. at 270; *Clover Leaf Creamery*, 449 U.S. at 471 n.15.

In view of the clear evidence of both discriminatory effect and discriminatory intent, there can be no doubt that the Base Fee discriminates against interstate commerce in violation of the Commerce Clause.¹³

2. The Alabama Supreme Court's contrary conclusion rests on a misunderstanding of this Court's precedents. The Alabama court stated that CWM had failed to establish a discriminatory effect because "[t]he mere fact * * * that most of its customers are out-of-state generators does not establish discrimination against interstate commerce." App., *infra*, 19a (citing *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981); and *Exxon Corp. v. Maryland*, 437 U.S. 117 (1978)). But we rely on more than the identity of our customers. We contended below and argue before this Court that the Base Fee has a discriminatory effect because it was carefully drafted to include virtually all interstate hazardous waste disposed of within Alabama and exclude virtually all Alabama hazardous waste. The express exemption of noncommercial hazardous waste facilities thus has the practical effect of shifting a disproportionate tax burden to interstate commerce.

Certainly the cases cited by the Alabama Supreme Court do not support its refusal to apply strict scrutiny. In *Commonwealth Edison*, the challenged coal severance tax applied evenhandedly to *all* coal mined in Montana, regardless of the coal's ultimate destination; coal mined for use in-state was not exempted from the tax. Out-of-state users thus bore the burden of the tax in exact proportion to the amount of coal they used. Accordingly, this Court held, "there [was] no real discrimination" requiring application of strict scrutiny. 453 U.S. at 619.

¹³ For the reasons discussed above in connection with the Additional Fee, the Base Fee does not further a legitimate purpose that cannot be served adequately by nondiscriminatory means. The State could accomplish its purposes through an across-the-board per-ton tax on all hazardous waste disposed of or transported in Alabama.

See also *CTS Corp.*, 481 U.S. at 87 (Indiana's facially neutral anti-takeover statute did not discriminate against interstate commerce in its practical operation because it "ha[d] the same effects on tender offers whether or not the offeror [was] a domiciliary or resident of Indiana").¹⁴

If the Base Fee applied to *all* hazardous waste disposed of in Alabama and if CWM's claim merely were that most hazardous waste disposed of in Alabama (and hence subject to the fee) is from out of state, this case would be similar to *CTS* and *Commonwealth Edison*. But the Base Fee does not apply to *all* hazardous waste disposed of in Alabama; instead it has been carefully drawn to apply only to waste disposed of at *commercial* hazardous waste disposal facilities, with the result that, as a practical matter, it applies almost exclusively to out-of-state waste. Surely if Montana had exempted "noncommercial" coal mines from the severance tax and if it turned out that virtually all of the coal from such mines was used within Montana, the Court would have found that the severance tax discriminated against interstate commerce in its practical effect.

Indeed, under the Alabama Supreme Court's apparent view that statutory exemptions are irrelevant in deter-

¹⁴ *Exxon Corp.*, *supra*, is even less apposite. That case involved a Maryland statute that barred petroleum refiners and producers from operating retail service stations within the state. The plaintiffs argued that the statute discriminated against interstate commerce because there were no Maryland-based refiners or producers. The Court rejected the argument, reasoning that while the statute prevented some interstate companies—*i.e.*, the refiners and producers—from operating service stations, it did not bar other interstate companies—those not engaged in refining and producing—from participating in the Maryland retail market. Because the statute did not discriminate against all interstate operators—it did not apply to the "several major interstate marketers of petroleum that own and operate their own retail gasoline stations [in Maryland]"—the statute did not discriminate in its practical operation. 437 U.S. at 125-126. Here, by contrast, Alabama has imposed the Base Fee on virtually all out-of-state waste, while exempting a large percentage of in-state waste.

mining whether a tax discriminates against interstate commerce in its practical effect, the statute in *McKesson* should have been upheld on the ground that it taxed all alcoholic beverages other than those few categories exempted in the statute. The fact that all of the exempt beverages were produced in Florida would have been irrelevant. That narrow view of discrimination against interstate commerce flies in the face of this Court's precedents.

B. The Decision Below Exacerbates The Conflict Among The Lower Courts Regarding The Circumstances In Which The Strict Scrutiny Test Should Be Applied To Facially Neutral State Laws.

The issue presented by the Alabama Supreme Court's decision regarding the Base Fee—when should a facially neutral statute be held to discriminate against interstate commerce—is an important question on which the lower courts are in conflict. This Court should grant certiorari to provide guidance regarding this issue.

To begin with, the role of evidence of discriminatory motive is a matter urgently requiring clarification. Such evidence has been held relevant in shedding light on the practical effect of a facially neutral statute. *Continental Illinois Corp. v. Lewis*, 827 F.2d 1517, 1521-1523 (11th Cir. 1987), vacated as moot, 110 S. Ct. 1249 (1990); *Oberly*, 822 F.2d at 400-401 n.18.¹⁵ The Alabama Supreme Court has now taken the diametrically opposite view, holding such evidence "irrelevant." App., *infra*, 19a-20a n.2.

The role of intent evidence is of course an issue that can arise in every Commerce Clause case and, for that reason, clear guidance for the lower courts is essential. This Court heard argument on the proper role of such evidence in *Lewis v. Continental Bank Corp.*, 110 S. Ct. 1249 (1990), but did not reach the question because subsequent federal legislation rendered the case moot. This case represents an opportunity to resolve that important issue.

¹⁵ This Court has even stated that evidence of such a motive by itself triggers strict scrutiny review. See page 22 n.12, *supra*.

Second, the decision below exacerbates a conflict regarding the standards for ascertaining whether a facially neutral statute discriminates against interstate commerce in its practical effect. Several lower courts have followed this Court's lead and invalidated facially neutral statutes structured so as to impose a disproportionate burden on interstate commerce. For example, the Ohio Supreme Court applied this rationale to strike down a coal use tax whose rate varied inversely with the sulphur content of the coal. Finding that virtually all Ohio coal had a high sulphur content, while a significant amount of coal from nearby states had a low sulphur content, the Ohio Supreme Court concluded that the tax scheme discriminated against out-of-state coal in its practical operation. *Dayton Power & Light Co. v. Lindley*, 58 Ohio St. 2d 465, 391 N.E.2d 716 (1979).

The Florida Supreme Court utilized the same approach in *McKesson*, striking down the facially neutral liquor tax because, as noted above (at 20), it contained an exemption that disproportionately benefitted in-state products at the expense of out-of-state products. *Division of Alcoholic Beverages & Tobacco v. McKesson Corp.*, 524 So. 2d 1000, 1008 (Fla. 1988), rev'd as to other issues, 110 S. Ct. 2238 (1990). See also *Continental Illinois Corp.*, 827 F.2d at 1522 (invalidating a Florida law banning new industrial savings banks because the effect of that law was to foreclose the only means that out-of-state bank holding companies had to compete for Florida deposits without disturbing the alternatives that were available only to in-state bank holding companies); *Opinion of the Justices*, 379 A.2d 782, 789 (N.H. 1977) (explaining, in an advisory opinion on the constitutionality of a proposed tax on operators of oil terminal facilities with storage capacities in excess of 500 barrels, that "[t]he line drawn at 500 barrels might have the effect of discriminating against interstate commerce if that line differentiates domestic from foreign corporations").

In contrast, the Colorado Supreme Court, like the Alabama Supreme Court, has refused to apply strict scrutiny

tiny notwithstanding a showing that the statute at issue disproportionately benefitted intrastate commerce. See *Archer Daniels Midland Co. v. State*, 690 P.2d 177 (Colo. 1984). At issue in *Archer Daniels* was a 5¢ per gallon sales tax reduction for gasohol that was available only for gasohol produced at facilities with an annual production capacity of 17 million gallons or less. The record reflected that no Colorado producer had an annual production capacity of over 17 million gallons, whereas over 75% of the national market was excluded by the capacity limitation. *Id.* at 192 (Lohr, J., dissenting). Despite this severely disproportionate impact, the closely-divided Colorado Supreme Court upheld the tax reduction provision under the *Pike* balancing test. The court's decision conflicts with the other decisions cited above. Indeed, the Florida Supreme Court expressly refused to follow it in *McKesson*. See 524 So. 2d at 1007.

In sum, the lower courts are plainly in need of guidance in determining when to apply strict scrutiny to facially neutral statutes. This Court should grant certiorari to address that question.

III. THE ALABAMA SUPREME COURT'S DECISION UPHOLDING THE CAP PROVISION ALSO WARRANTS REVIEW BY THIS COURT.

The Alabama Supreme Court refused to subject the Cap Provision to strict scrutiny, stating: "Tonnage restrictions which apply equally to all waste, regardless of origin, do not violate the Commerce Clause." App., *infra*, 26a. The court's conclusion that the Cap Provision does not discriminate against interstate commerce—and its ultimate decision upholding that provision—are tied to its decisions upholding the Additional Fee and Base Fee and merit review for much the same reasons.

To begin with, invalidation of either of the taxes on Commerce Clause grounds would necessitate invalidation of the Cap Provision. See App., *infra*, 92a-93a (trial court decision). The cap would be tainted because the amount was fixed at a time when the disposal volume was severely and improperly depressed by the illegal taxes.

The cap itself also independently discriminates against interstate commerce. To begin with, the Alabama Supreme Court's basic premise—that the Cap Provision is facially neutral—is plainly wrong. The provision contains an exception that permits disposal of additional waste if necessary either to protect human health or the environment *in the State* or to meet *Alabama's* federal obligation to assure sufficient capacity to dispose of *Alabama-generated* waste. By its very terms, therefore, this condition can be satisfied only if there is a need to dispose of Alabama-generated waste. Thus, through this facially discriminatory exception, the State has ensured that the comparatively small percentage of in-state waste disposed of at the Emelle facility never actually will be subject to the annual limit that out-of-state waste must face.

Like the Base Fee, moreover, the Cap Provision applies only to "commercial" disposal facilities and therefore discriminates against interstate commerce in its practical effect. By imposing the cap only on commercial hazardous waste facilities that disposed of over 100,000 tons of hazardous waste from July 15, 1990 through July 14, 1991, the State artfully has ensured that the annual limit will apply *only* to the Emelle facility. Because the Emelle facility disposes of virtually all of the hazardous waste that is brought to Alabama from other states, the annual limit will serve to limit the amount of out-of-state waste that can be disposed of at the Emelle facility in any one year, while allowing the overwhelming majority of in-state waste—the waste that is disposed of at other facilities—to escape any limit whatever.

The record also contains considerable evidence that the Cap Provision, like Act No. 90-326 as a whole, was motivated by an intent to discourage the disposal of out-of-state waste in Alabama. For example, when Governor Hunt signed Act No. 90-326 into law, he stated: "An important provision in this bill will cap the amount of hazardous waste that can be dumped in Alabama at whatever amount is brought to the state over the next 12 months." Pl. Exh. 80. See also Pegues Dep. 50-51,

61-62. As explained with regard to the Base Fee (at 22), this supports the conclusion that the Cap Provision is unconstitutionally discriminatory.

IV. THE QUESTIONS PRESENTED HAVE CONSIDERABLE PRACTICAL SIGNIFICANCE.

The constitutionality under the Commerce Clause of state laws that discriminate against out-of-state waste is a question of tremendous practical importance. CWM's payments for the first year the two fees have been in effect totaled approximately \$34 million. And the discriminatory burdens on interstate commerce have diverted a substantial amount of interstate commerce away from the Emelle facility and Alabama. The volume of waste disposed of at CWM's Emelle facility has dropped by *more than 50%* in the year since Act No. 90-326 took effect. Out-of-state waste accounts for virtually all of the decline. This devastating blow to interstate commerce in general—and to CWM's business in particular—is made permanent by the Cap Provision.

The threat to interstate commerce involves more than just money. The Emelle facility plays a critical role in the safe disposal of the Nation's hazardous waste. As the circuit court found, "Emelle received two years ago approximately 17% of all hazardous wastes commercially landfilled in the United States." App., *infra*, 58a. There are only five commercial hazardous waste landfills east of the Mississippi River, and only two of those are permitted to accept waste containing PCBs. Tr. 170 (testimony of Rodger Henson); 250 (Robertson).¹⁶ Interstate transportation of such waste is therefore unavoidable if the waste is to be disposed of in facilities that comply with the governing federal standards. See, *e.g.*, Tr. 82 (Henson); 215-216 (Robertson).

This is especially true with respect to the considerable amount of waste disposed of at Emelle that has been removed from unsafe disposal sites, as a result of either

¹⁶ At the time of the trial, only one landfill east of the Mississippi River could accept PCBs.

voluntary efforts or cleanups under federal and state "Superfund" programs. Virtually all of that waste comes from outside Alabama. See Tr. 55, 160 (Henson); 210-212 (Robertson). The significant increase in cost resulting from the Additional and Base Fees, and the permanent annual limit effectuated by the Cap Provision, will almost certainly deter cleanup efforts, thus prolonging the grave threat that these unregulated, unsafe sites pose to the public at large. That result will undermine Congress's primary purpose in enacting the Superfund statute: "the prompt cleanup of hazardous waste sites." *J.V. Peters & Co. v. Administrator*, 767 F.2d 263, 264 (6th Cir. 1985) (citation omitted). By raising a significant barrier to the disposal of out-of-state waste at the Emelle facility, which provides a significant part of the Nation's overall waste disposal capacity, Act No. 90-326 thwarts the important public goal of safely disposing of this waste.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1991

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APPENDICES

1a

APPENDIX A

SUPREME COURT OF ALABAMA

SPECIAL TERM, 1991

1901043

GUY HUNT, as Governor of the State of Alabama

v.

CHEMICAL WASTE MANAGEMENT, INC.

1901044

JAMES M. SIZEMORE, JR., as Commissioner of the
Alabama Department of Revenue; and the
ALABAMA DEPARTMENT OF REVENUE

v.

CHEMICAL WASTE MANAGEMENT, INC.

1901106

CHEMICAL WASTE MANAGEMENT, INC.

v.

THE ALABAMA DEPARTMENT OF REVENUE, *et al.*

Appeals from Montgomery Circuit Court
(CV-90-1098)

SHORES, JUSTICE.

In April 1990, the Alabama Legislature enacted Act No. 90-326 (the "Act"), effective July 15, 1990, *Code of Ala.* 1975, § 22-30B-1 et seq. (Supp. 1990), which was signed into law by the Governor. The Act imposes two fees on the disposal of hazardous waste at commercial facilities in Alabama. A "Base Fee" of \$25.60 per ton was imposed on all waste and substances disposed of at commercial facilities, regardless of the state of origin. An "Additional Fee" of \$72.00 per ton was imposed on all waste and substances generated outside the State of Alabama and disposed of at Alabama facilities.

The Act also included a "Cap" provision, limiting the amount of hazardous waste that can be disposed of at any affected facility in any one-year period. Under the Cap provision, the amount of hazardous waste disposed of during the first year that the Act's new fees are in effect (the "benchmark period"), becomes the permanent ceiling in subsequent years. The Cap provision applies only to commercial facilities that dispose of over 100,000 tons of waste per year. The facility at Emelle, Alabama, is the only facility in this category.

On June 5, 1990, Chemical Waste Management, Inc. ("CWM"), filed suit for declaratory relief against the Alabama Department of Revenue, James N. Sizemore, Jr., as Commissioner, and Guy Hunt as Governor ("the State"). The suit challenged the constitutionality of Act No. 90-326, *Code of Alabama* 1975, § 22-30B-1 et seq. CWM alleged that the provisions of the Act violate the Commerce Clause of the United States Constitution; the Equal Protection Clause of the United States Constitution and its equivalents under the State Constitution; and the Due Process Clause of the State Constitution. CWM further contends that the Act is a "revenue bill" enacted during the last five days of the legislative session in violation of Article IV, § 70, of the Alabama Constitution.

CWM further contends that the Cap provision violates the Commerce, Due Process, and Equal Protection Clauses of the United States Constitution and is preempted by various federal statutes.¹

CWM also sought a preliminary and permanent injunction enjoining the State from enforcing, applying, or attempting to enforce the Act. Dr. Claude Earl Fox, state health officer, was allowed to intervene on behalf of the State Board of Health.

Governor Hunt filed a counterclaim for declaratory relief, asking that the trial court find and declare the Act constitutional. On February 28, 1991, the trial judge, the Honorable Joseph D. Phelps, declared the Base Fee and Cap provisions of the Act to be valid and constitutional. However, he declared the Additional Fee imposed on out-of-state generated waste to be impermissible and invalid as a violation of the Commerce Clause of the United States Constitution.

The State appeals only that aspect of the trial judge's order pertaining to the Additional Fee. CWM appeals from the trial judge's holding that the Base Fee and Cap are constitutional. We affirm the trial judge's holdings that the Base Fee and Cap provisions of the Act are valid and constitutional. We reverse the holding of the trial judge that the Additional Fee violates the Commerce Clause.

The legislative findings underlying Act No. 90-326, as quoted by the trial judge in his order of February 28, 1991, are as follows:

¹ (1) the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 et seq.; (2) the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2601 et seq.; (3) the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq.

"Act § 1, Code § 22-30B-1.1 Legislative findings.

"The Legislature finds that:

"(1) The state is increasingly becoming the nation's final burial ground for the disposal of hazardous wastes and materials;

"(2) The volumes of hazardous wastes and substances disposed in the state have increased dramatically for the past several years;

"(3) The existence of hazardous waste disposal activities in the state poses unique and continuing problems for the state;

"(4) As the site for the ultimate burial of hazardous wastes and substances, the state incurs a permanent risk to the health of its people and the maintenance of its natural resources that is avoided by other states which ship their wastes to Alabama for disposal;

"(5) The state also incurs other substantial costs related to hazardous waste management including the costs of regulation of transportation, spill clean-up and disposal of ever increasing volumes of hazardous wastes and substances;

"(6) Because all waste and substances disposed at commercial sites for the disposal of hazardous waste and hazardous substances, whether or not such waste and substances are herein defined as hazardous, contribute to the continuing problems created for the state, and because state and federal definitions of 'hazardous wastes' have regularly changed and are likely to change in the future to include waste not previously defined as hazardous, it is necessary that all waste and substances disposed of at a commercial site for the disposal of hazardous waste or hazardous substances be included within the requirements of this act;

"(7) The legislature finds that the public policy of the state is to encourage business and industry to develop technology that will eliminate the generation of hazardous waste and substances. . . .

"(8) Since hazardous wastes and substances generated in the state compose a small proportion of those materials disposed of at commercial disposal sites located in the state, present circumstances result in the state's citizens paying a disproportionate share of the costs of regulation of hazardous waste transportation, spill cleanup and commercial disposal facilities. Persons, firms or corporations which generate and dispose of such waste and substances in Alabama presently are among the taxpaying citizens of this state who must bear the burden of regulation, inspection, control and clean-up of hazardous waste sites; addressing the public health problems created by the presence of such facilities in the state; and, preserving this state's environment while those generating this waste in other states and shipping it to Alabama for disposal presently are not. This act attempts to resolve that inequity by requiring all generators of waste being disposed of in Alabama to share in that financial burden.

"(9) The operators of commercial sites for the disposal of hazardous wastes or hazardous substances have the ability to control the flow of said wastes or substances into said sites. Further, said operators, by exercise of said ability to control the flow of wastes or substances disposed at sites during a twelve-month period [need] only to enlarge the amount of wastes disposed during the next twelve-month period by a proportionate amount. The health of the population of this state and the soundness of the environment are and would be threatened by such an exercise of control. Said exercise of control could cause an artificial decrease in fees during the twelve-month period beginning July 15, 1990, and ending

July 14, 1991. To prevent threats to the health of the population of this state and to the soundness of the environment of this state and to prevent an artificial decrease in fees during the twelve-month period beginning July 15, 1990, and ending July 14, 1991, this act provides a cap on the amount of hazardous waste and hazardous substances disposed during the twelve-month period beginning October 1, 1991, said cap being a function of the amount of hazardous waste and hazardous substances disposed during the twelve-month period beginning July 15, 1990, and ending July 14, 1991."

The pertinent provisions of Act No. 90-326 are as follows:

Act § 3(a), Code § 22-30B-2(a) (the Base Fee):

"In addition to other fees levied, there is hereby levied a fee to be paid by the operators of each commercial site for the disposal of hazardous waste, or hazardous substances in the amount of \$25.60 per ton for all waste or substances disposed of at such site."

Act § 3(b), Code § 22-30B-2(b) (The Additional Fee):

"For waste and substances which are generated outside of Alabama and disposed of at commercial sites for the disposal of hazardous waste or hazardous substances in Alabama, an additional fee shall be levied at the rate of \$72.00 per ton."

Act § 9, Code § 22-30B-2.3 (the Cap Provision):

"Any commercial site for the disposal of hazardous waste or hazardous substances that disposes of in excess of 100,000 tons of hazardous waste or hazardous substances during the twelve-month period beginning July 15, 1990, and ending July 14, 1991, (here-

inafter referred to as the benchmark period) shall not, during any twelve-month period beginning October 1, 1991, and any twelve-month period thereafter, dispose of more than the tonnage received during said benchmark period. Such restriction shall be in addition to any other ban or restrictions on disposal imposed by any regulatory authority. Provided, however, that the Governor or the Governor's designee may allow disposal of hazardous wastes or hazardous substances in excess of the tonnage disposed of during the benchmark period if such action is determined by the Governor or the Governor's designee to be necessary to protect human health or the environment in the state, or to allow the state to comply with its obligations to assure disposal capacity pursuant to applicable state or federal law as determined by the Governor or his designee."

Act § 2, Code § 22-30B-1 (Definitions):

"(3) HAZARDOUS SUBSTANCE(S). Any substance defined as a hazardous substance pursuant to 42 U.S.C. § 9601(14), as amended, or listed as a hazardous waste pursuant to the Code of Alabama 1975, Section 22-30-10, as amended.

"(4) HAZARDOUS WASTE(S). Those wastes defined at Section 22-30-3(5), Code of Alabama 1975, as amended, or listed pursuant to Section 22-30-10, Code of Alabama 1975, as amended, or department regulations."

The trial judge made findings of fact in his order of February 28, 1991, which we quote below and approve:

"FINDINGS OF FACT"

"1. Based on statements and representations made by the parties during pretrial proceedings, the Court accepts the legislative findings supporting Act No.

90-326. In addition, the Court finds that the evidence at trial adequately supports the legislative findings. The Court further finds that the Base Fee and Cap provisions of Act No. 90-326 which this Court determines and finds to be constitutionally permissible are integral parts of a regulatory procedure which appropriately addresses the concerns expressed by the Alabama Legislature when it enacted the 'Hazardous Wastes Management Act of 1978.' The following statement of Legislative Finding, Purpose and Intent is set forth in this 1978 legislation:

"Section 2. Legislative Finding, Purpose and Intent—The Legislature finds that increasing quantities of hazardous wastes are being generated in the State and that without adequate safeguards from the point of generation through handling, processing and final disposition, such wastes can create conditions which threaten human or animal health and the environment. The Legislature, therefore, declares that in order to minimize and control any such hazardous conditions it is in the public interest to establish and to maintain a statewide program to provide for the safe management of hazardous wastes."

"Acts 1978, 2nd Ex.Sess., No. 129, p. 1843.

"A. The Emelle Facility

"2. CWM is a Delaware corporation with its principal place of business in Oak Brook, Illinois. CWM is the owner and operator of one of the nation's oldest and largest commercial hazardous waste land disposal facilities located in Emelle, Alabama (the 'Emelle facility'). The Emelle facility is a hazardous waste treatment, storage, and disposal facility operating pursuant to a permit issued by the Environmental Protection Agency ('EPA') under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* ('RCRA') and the Toxic Substances

Control Act, 15 U.S.C. § 2601 *et seq.* ('TSCA'). In addition, the Emelle facility is authorized to operate under state law pursuant to interim status authority granted under Alabama Code § 22-30-12(i). The Emelle facility is the only commercial hazardous waste landfill facility currently in operation in the State of Alabama.

"3. In a 1973 study, EPA identified 74 potential sites for hazardous waste landfills throughout the country, of which Emelle was one. Although hazardous waste landfills can be designed and engineered to operate in practically every state of the United States, only a very few commercial sites presently exist. Efforts to obtain permits for new sites in other states are resisted by citizens of those states.

"4. According to the testimony presented at trial, only one additional hazardous waste landfill has been permitted in the United States since the effective date of RCRA, November 17, 1980. That facility, in Last Chance, Colorado, has never operated or accepted waste and is presently for sale.

"B. The Increasing Volumes of Out-of-State Wastes at Emelle

"5. Increasing amounts of out-of-state hazardous wastes are being shipped to Emelle for permanent storage from in-state generators and from those in states throughout the country. The following tonnage has been received by Emelle in the years indicated:

"1985	341,000 tons
"1986	456,000 tons
"1987	564,000 tons
"1988	549,000 tons
"1989	788,000 tons

"The increase in tonnage has resulted in a significant increase in problems with regard to regulating and supervising the disposal of hazardous waste at Emelle. Eighty-five to ninety percent of the tonnage permanently buried at Emelle is from out-of-state. Emelle received two years ago approximately 17% of all hazardous wastes commercially landfilled in the United States.

"6. CWM estimates there is capacity at Emelle for another 100 years of operation. CWM has admitted that without the restrictions imposed by the Alabama legislature, 'the total annual demand for disposal capacity at the Emelle facility for hazardous waste generated out-of-state is projected to increase annually.' (Paragraph D of Answer of CWM to Defendant Hunt's Counterclaim.)

"7. A portion of the wastes coming to Emelle are classified as non-hazardous. Some of these non-hazardous industrial wastes are sent to the Emelle facility by industries which may be seeking to reduce their own liability should these wastes become classified as hazardous wastes in the future. Additionally, these non-hazardous wastes are commingled with the hazardous wastes that are landfilled at the Emelle facility and therefore for the purposes of long-range monitoring and potential cleanup, must be treated as hazardous waste in any event. EPA, moreover, has made limited progress in identifying hazardous wastes to be regulated and does not know whether it has identified 10% or 90% of existing hazardous wastes. As a result, wastes which today are deemed non-hazardous may very well in the future be deemed hazardous for one reason or another.

*"C. The Permanent Risks and Costs
of Hazardous Waste Landfilling*

"8. It is without dispute that the wastes and substances being landfilled at the Emelle facility include substances that are inherently dangerous to human health and safety and to the environment. Such waste consists of ignitable, corrosive, toxic and reactive wastes which contain poisonous and cancer causing chemicals and which can cause birth defects, genetic damage, blindness, crippling and death. Should a sudden or non-sudden discharge or release occur, hazardous wastes could pollute the environment, contaminate drinking water supplies, contaminate the ground water, and enter the food chain. Among these are arsenic, mercury, lead, chromium and cyanide. These wastes are generated by an entire spectrum of industry.

"9. Landfilling is the least desirable means of hazardous waste disposal. Many hazardous wastes remain in the environment and do not break down. Although some wastes degrade or can be made less hazardous through treatment, many substances remain hazardous forever.

"10. Although hazardous wastes are now required to be solidified before being placed in a landfill, seepage of groundwater and surface water into closed trenches at Emelle containing liquid or solidified wastes creates a poisonous liquid known as leachate. Scientists are continuing to learn more about leachate and water pressures. As concluded in the August, 1983 report to CWM by Golder Associates, the accumulation of leachate in closed trenches will result in a 'vertical head difference serv[ing] as the driving force which will eventually cause exfiltration of fluid within the landfill trenches outward into the surrounding chalk.' The testimony at trial was that

it appears that leakage has already occurred with respect to at least some of the closed trenches. Leachate is presently pumped only from closed Trench 19 and open Trench 21. It is stored in above ground storage tanks with a capacity of 5 million gallons. From 10 million to 15 million gallons annually of leachate and surface water are gathered, stored and transported from Emelle at a cost of \$2 to \$3 million.

"11. EPA has found that absolute prevention of migration of hazardous waste through synthetic trench liners is beyond the current technical state of the art, and that some migration will occur. The liners will probably retard migration only for the relatively short-term measured in tens of years. Although it appears that leachate is already seeping into the Selma chalk, it is uncertain how far it has moved and at what rate it will travel. There are widely varying estimates as to travel time. A November, 1987 joint report of the hazardous waste Ground-Water Task Force of EPA and the Alabama Department of Environmental Management ('ADEM') entitled 'Evaluation of Chemical Waste Management, Inc., Emelle, Alabama', stated at page 30 as follows:

"The transit time through the Selma chalk ('to the Eutaw Formation . . . uppermost aquifer') was estimated by CWM to be 10,000 years. Independent EPA estimates of transit time using conservative estimate for equation variable were 330 years and 3,000 years for estimates using Darcy's Equation and a 2-D solute transport model, respectively. . . ."

"Those transit time estimates all involve complicated calculations based upon highly variable factors.

"12. The evidence shows that possibly a more serious concern is the lateral migration of leachate from the trenches following the downward gradient to the drainage areas leading to Bodka Creek, a tributary of the nearby Noxubee and Tombigbee Rivers. Although the closed trenches studied by Golder Associates in an August, 1990 report range from 50 to 150 feet apart, a CWM expert witness testified it would surprise him if there were a migration of fluid from some of the closed trenches to other closed trenches; that there probably is some interconnection between those trench walls; and that fluid could move along the near surface defects in the downgradient direction.

"13. The Selma Group Chalk Formation, in which the Emelle facility is located, extends across the states of Alabama, Mississippi, Arkansas and Texas. Although the chalk generally is of low permeability and is potentially suitable for the geological containment of hazardous wastes, the geologic integrity of the chalk also depends on the permeability of fractures, faults and other discontinuities. Faults and fractures exist throughout the Selma chalk at Emelle through which the leakage of hazardous waste and leachate may be greatly facilitated. Dr. Richard Groshong, a geology professor at the University of Alabama, testified that the faults and fractures may accelerate travel time through the Selma chalk by several orders of magnitude. According to Dr. Groshong, these rates 'are important on a human time scale as opposed to a geological time scale.' Tom Joiner, a former State Geologist, agreed that a 'brittle fault' might speed the migration of leachate through the Selma chalk.

"14. Dr. Groshong testified that there is a further need to identify, map, and study the faults and fractures at the Emelle facility. However, there will

always be uncertainty with respect to the faults and fractures.

"15. To monitor leachate and hazardous waste leakage, CWM has been required to install a large number of monitoring wells at Emelle. Periodic checks of those monitoring wells will be required forever. One CWM witness estimated the present annual costs of that monitoring system is between \$100,000 and \$200,000. Another CWM official estimated monitoring costs of Emelle to be in excess of \$1½ million per year. It is doubtful that monitoring wells can be placed in sufficient locations to monitor all the movement of water as such monitoring may prove to be impractical. Thus, the uncertainty of whether all contamination will be detected will likely remain. Indeed, the existence of monitoring wells creates new conduits for hazardous wastes to reach underlying groundwater.

"16. The Emelle facility is within an earthquake risk zone as designated by the Alabama Emergency Management Agency. There was testimony to the effect that earthquakes pose an uncertain short and long range risk to the Emelle facility. In 1886 an earthquake in Sumter County caused a one-half foot movement in the ground surface. There was evidence that, depending upon its severity, an earthquake could unseal cracks in the chinks and open avenues for the movement of leachate and hazardous wastes.

"D. *Transportation and Spills*

"17. In 1989, approximately 40,000 truckloads of wastes were transported over the public highways to the Emelle facility of which approximately 34,000 to 36,000 were from out of state. As in the operation of the facility, transportation of these wastes, no matter how elaborate the precautions, also creates

unquantifiable risk or uncertainty to the public health and to the environment.

"Some trucks destined for Emelle have been involved in accidents causing hazardous waste to be spilled or released into the environment. Additionally, several incidents of releases of hazardous wastes and noxious fumes have already occurred at the facility. These risks are increased by the increasing volumes. The hazardous wastes landfilled at the Emelle facility are inherently dangerous in their transportation and movement into or from one place to another throughout the State of Alabama. That movement into and through the State of Alabama carries the potential and risk of spills, accidents and explosions that could release toxic fumes and contaminate the groundwater and/or surface water. The increasing volumes have increased the risks and liability involved in that transportation.

"E. *Permanence of Dangers and Financial Risks*

"18. Although it will be necessary to monitor, regulate, maintain (including the pumping, collection, storage, transportation and disposal of leachate from the trenches), and secure the facility forever, CWM has made no provision for the payment of such costs beyond a period of 30 years after closure. Additionally, there has been no provision for the payment of any abatement, corrective, or remediation costs, compliance monitoring, third-party damages or natural resource damage.

"19. Whenever CWM's planned or unplanned cessation of activities at Emelle occurs, there will be substantial financial and environmental risks to the people, businesses, and corporations of Alabama.

"20. Alabama has a legitimate interest in guarding against the various imperfectly understood en-

vironmental risks posed by the storage of large quantities of hazardous wastes in Alabama, as well as the risks which may be more easily identified.

"F. The Legislative Classifications

"21. The CWM hazardous waste facility at Emelle currently is the only commercial hazardous waste landfill in Alabama. Of the 788,000 tons of waste landfilled at Emelle during 1989, 68,000 to 69,000 tons were generated in-state, or 8.6% of the 1989 total.

"22. There is only one, relatively small non-commercial hazardous waste landfill facility presently permitted for hazardous waste in Alabama. It is in Washington County, and it accepts only on-site generated hazardous waste of approximately 4000 tons a year.

"23. Closed non-commercial hazardous waste landfills (such as Sanders Lead in Troy) are not comparable to Emelle. They only accepted on-site generated hazardous waste and are no longer in operation.

"24. Non-commercial hazardous waste facilities are not comparable to commercial hazardous waste facilities. Commercial facilities are likely to involve the transportation of wastes from off-site locations, and the accumulation and disposal of relatively large quantities of hazardous wastes; most non-commercial facilities dispose of wastes on-site, and generally do not involve transportation. The amounts generated and disposed of at non-commercial facilities are far smaller than amounts disposed of at commercial facilities. Accordingly, the public health and safety risks associated with commercial hazardous waste facilities are much greater than those associated with non-commercial facilities.

"25. Incinerators are not comparable to commercial hazardous waste landfills. Incinerators permanently destroy hazardous waste, leaving only a small residue which must be landfilled.

"26. Should additional commercial hazardous waste landfills be permitted in Alabama, and meet the statutory criteria, the provisions of Act 90-326 would apply to them just as they apply now to CWM."

I.

We first consider whether the trial court erred in holding that the Base Fee of Act No. 90-326 is constitutional. CWM contends the trial court erred in finding the Base Fee constitutional and argues that it clearly discriminates against interstate commerce in violation of the Commerce Clause. CWM argues further that the Base Fee violates the Equal Protection Clause, because, it claims, the classifications are not rationally related to a legitimate state interest. CWM finally argues that the Base Fee violates the Due Process Clause.

We do not find CWM's arguments as to this issue to be persuasive. We adopt the conclusions of law stated by Judge Phelps in his order of February 28, 1991, as the decision of this Court as to this issue:

"The Base Fee

"(1) The Commerce Clause Challenge

"As a threshold matter, the Court concludes that the Base Fee regulates evenhandedly and without regard to origin. The Base Fee effectuates a legitimate local interest. The legislature found, among other things, that: the volume of hazardous wastes being disposed of in Alabama has increased dramatically; the state incurs a permanent risk to the health of its people and the maintenance of its natural resources; and Alabama incurs substantial eco-

conomic costs related to hazardous waste management such as regulatory costs and spill cleanup. Additionally, the evidence at trial documented specific possible threats to human health and the environment posed by the Emelle facility. Clearly, the state of Alabama has a legitimate interest in imposing fees on commercial hazardous waste facilities to address the serious financial, environmental and other risks they create.

"It is well-settled that states' regulatory powers are greatest when they address traditional matters of local concern such as environmental and natural resource regulation. *Kassel v. Consolidated Freightways*, 450 U.S. 662, 670, 101 S.Ct. 1309, 67 L.Ed.2d 580, 586 (1981). Legislative measures enacted to promote public health and safety are accorded particular deference. *Raymond Motor Transportation, Inc. v. Rise*, 434 U.S. 429, 443, 98 S.Ct. 787, 54 L.Ed.2d 664, 676 (1978). Challenges to state public safety regulations must overcome a 'strong presumption of their validity.' *Id.*, 434 U.S. at 444, 98 S.Ct. at 795, 54 L.Ed.2d at 677. Courts will not second-guess legislative judgments about the importance of safety justifications in comparison with the burdens on interstate commerce. *Kassel*, 450 U.S. at 670, 67 L.Ed.2d at 587. States retain broad authority under their general police powers to regulate matters of legitimate local concern even though interstate commerce is affected. *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

"When a police power regulation is challenged under the Commerce Clause, one of two tests is applied. If the regulation is discriminatory on its face or in practical effect, the state must show that (1) the regulation has a legitimate local purpose; (2) the regulation serves this interest; and (3) reasonable nondiscriminatory alternatives, adequate to pre-

serve the legitimate local purpose, are not available. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). This is the 'strict scrutiny' test.

"If no facial discrimination is involved, a 'balancing test' is applied to determine the constitutional validity of statutes:

" 'Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'

Pike v. Bruce Church, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). If a legitimate local purpose exists, 'the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.' *Id.*

"CWM has failed to establish that the Base Fee has discriminatory effects on interstate commerce. The mere fact, as CWM argues, that most of its customers are out-of-state generators does not establish discrimination against interstate commerce. The United States Supreme Court has stated that even if the burden of a state regulation falls most often on out-of-state companies, this burden 'does not, by itself, establish a claim of discrimination against interstate commerce.' *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987); see also *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981); *Exxon Corp. v. Gov. of Maryland*, 437 U.S. 117, 126 (1978). The strict scrutiny test does not apply in these circumstances.²

² "The Court deems irrelevant any evidence attributing to any state officials any motive of discriminating against interstate

"The Base Fee does not facially discriminate against out-of-state waste. All waste disposed of at Alabama commercial hazardous waste facilities is subject to the \$25.60 fee. Consequently the *Pike v. Bruce Church* balancing test will be applied to assess the fee's constitutional validity. In balancing the interests at stake, the Court finds that the burden the Base Fee imposes on interstate commerce is not clearly excessive in relation to the benefits it produces. The fee benefits the state, on the other hand, by compensating it for the financial responsibilities and risks it bears on account of commercial hazardous waste disposal activities. Thus, a comparison of the Base Fee's local benefits to its alleged burden on interstate commerce establishes that any such burden is not clearly excessive. Furthermore, to the extent that the Base Fee does deter hazardous waste landfilling, the fee is a proper instrument of deterrence.³ Finally, in view of the financial, safety, environmental and other objectives of Act No. 90-326 and the fact that the Base Fee falls evenhandedly on interstate and intrastate waste, it is difficult to imagine how these objectives could be accomplished in ways that have a lesser impact on interstate activities.

"For these reasons, CWM's Commerce Clause challenge to the Base Fee is without merit.

commerce. It is well-established that '[i]nquiries into [law-makers'] motives or purposes are a hazardous matter. . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, . . . ' *United States v. O'Brien*, 391 U.S. 367, 383-84, 88 S.Ct. 1673, 1682-83, 20 L.Ed.2d 672, 684 (1968), cited in, *CECOS International, Inc. v. Jorling*, 895 F.2d 66, 73 (2d Cir. 1990)."

³ "Similarly, in the forms which the EPA submits in connection with its waste reduction program, the agency asks states to list measures they are taking to reduce the generation of waste; the EPA lists fees as one example of such measure."

"(2) The Equal Protection Challenge

"The Equal Protection Clause of the United States Constitution and similar provisions of the Alabama Constitution prohibit the State of Alabama from denying any person equal protection of the law. There is a 'presumption of constitutionality which can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.' *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364-65 (1973). See also *White v. Reynolds Metals Co.*, 558 So.2d 373 (Ala. 1989). 'The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.' *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). Unless the state statute involves a suspect class or a fundamental right, courts generally will not overturn the statute on equal protection grounds 'unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the legislature's actions were irrational.' *Pennell v. San Jose*, 485 U.S. 1, 14 (1988) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)). The statute must be 'rationally related to a legitimate state interest.' *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 81, 108 S.Ct. 1645, 100 L.Ed.2d 62, 74 (1988) (quoting *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985)). If the state legislature's determination that its regulation will serve a legitimate public purpose is 'at least debatable,' the challenge to that action must fail. *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938). '[C]ourts are not empowered to second-guess the wisdom of state policies.' *Western & Southern Life Ins. Co. v. Board of Equalization*, 451 U.S. 648, 670 (1981). This 'rational relationship' test is not diffi-

cult to pass. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985). Additionally, state regulations dealing with health, welfare and the economy are entitled to deferential Equal Protection review. *Evergreen Waste Systems, Inc. v. Metropolitan Service District*, 643 F. Supp. 127, 133 (D.Or. 1986) (citing *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976)); *Railway Express Agency v. New York*, 336 U.S. 106 (1949)). State tax legislation is given great deference. *White v. Reynolds Metals Co.*, 558 So.2d at 380. States are free to impose taxes on different trades and professions, and may vary the tax rates on different products. *Id.* (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526-27 (1959)). Because the Base Fee provision involves neither a suspect class, such as race, nor a fundamental right, such as free speech, this Court must analyze the statute under the above-described, lenient 'rational relationship' test, see *Exxon Corp. v. Eager-ton*, 462 U.S. 176, 195-96 (1983), asking 1) whether the provisions have a legitimate purpose, and 2) whether it was 'reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose. . . .' *Western & Southern Life Ins. Co.*, 451 U.S. at 668.

"CWM argues that the Base Fee deprives it of equal protection of the law because it only applies to *commercial* hazardous waste facilities, and its Emelle operations constitute the only such facility in Alabama. The Court does not agree with this contention. First, the Court does not agree with the implication that CWM has somehow been 'singled out' because the Base Fee, as a practical matter, only applies to it. There is no evidence to suggest that Act No. 90-326 will not apply to commercial hazardous waste facilities which are sited in Alabama in the future. Until that time, any regulation of commercial hazardous waste facilities will neces-

sarily fall on CWM alone. This fact, however, does not prevent the legislature from regulating CWM's operations.⁴

"Second, the Court finds that the legislature's treatment of commercial hazardous waste facilities differently from non-commercial facilities is rationally related to legitimate state interests. The evidence at trial established several reasons for the differentiation. For example, the use of commercial disposal sites poses unique health and safety risks, such as the transportation of dangerous materials to the sites with the risk of accidents involving such transportation, and the accumulation in one place of extremely large volumes of different types of waste. The number of trucks delivering hazardous waste to the Emelle facility alone was approximately 40,000 during 1989, and was expected to increase in subsequent years. Hazardous waste disposal at non-commercial facilities, however, does not involve transportation of the materials to be disposed of, with the dangers inherent in and unique to such transportation. Such facilities dispose of their waste on-site. In *CECOS International, Inc. v. Jorling*, 895 F.2d 66 (2d Cir. 1990), the plaintiffs argued that a state law requiring siting board approval for the expansion of commercial, but not non-commercial, hazardous waste facilities violated equal protection. The Second Circuit rejected this argument because the state provided several reasons for applying this requirement to commercial facilities. The reasons included the fact 'that there are greater risks associ-

⁴ CWM's claim that the legislature was motivated by improper motivations is also irrelevant for equal protection purposes. '[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of those who voted for it.' *Palmer v. Thompson*, 403 U.S. 217, 224, 91 S.Ct. 1940, 1944, 29 L.Ed.2d 438 (1971), cited in *CECOS International v. Jorling*, *supra*, 895 F.2d at 73."

ated with commercial facilities because hazardous wastes must be transported to the off-site commercial facility.' *Id.* at 73 (emphasis supplied). The State of Alabama has offered similar reasons for the classification now before the Court.

"Moreover, commercial landfill facilities comprise the bulk of the hazardous waste accumulation problem. The waste disposed of at commercial facilities exceeds many times the waste disposed of on site by non-commercial facilities. Additionally, without regard to the health, safety and environmental concerns, and viewing the fees simply as taxes, the legislature is not precluded from taxing a commercial transaction simply because it does not impose the tax on a similar non-commercial activity. Many constitutionally permissible tax measures treat different taxable entities in different ways.

"Thus, CWM has failed to meet its burden of negating every conceivable basis which might support Act No. 90-326's differing treatment of commercial and non-commercial facilities. *White v. Reynolds Metals Co.*, *supra*. The differentiation serves a legitimate purpose and it was reasonable for the legislature to believe that the classification promotes that purpose. This Court, therefore, must defer to the legislature's classification of these two types of facilities.

"(3) *The Due Process Challenge*

"Article I, section 6 of the Alabama Constitution states, among other things, that no accused in a criminal prosecution shall be deprived of life, liberty, or property except by due process of law. This right has been extended to civil trials. *Ross Neely Express, Inc. v. Alabama Dep't. of Environmental Management*, 437 So.2d 82, 84 (Ala. 1983). In order to avoid violating the Due Process Clause of the Ala-

bama Constitution, a legislative classification must be reasonable and not arbitrary. *White v. Associated Industries of Alabama, Inc.*, 373 So.2d 616, 617 (Ala. 1979).

"The Base Fee is reasonable in function. It provides some financial assurance against the risks associated with materials posing a permanent threat to health, safety and the environment. The burden imposed is not an excessively heavy one. While CWM's right to maximize profits is certainly important, it does not by any stretch of the imagination outweigh the state's interest in protecting the health and safety of its citizens and environment. Under any kind of 'rational and reasonable' analysis, therefore, the Base Fee is clearly valid.

II.

Next we must consider whether the trial court erred in holding that the Cap provision of Act No. 90-326 is constitutional and is not preempted by federal statutes.⁵ We find the reasoning and the conclusions of law by the trial judge to be persuasive on this issue. We therefore adopt Judge Phelps's order of February 28, 1991, as to the issue of the Cap provision, as the decision of this Court:

"THE CAP PROVISION

"(1) *The Commerce Clause Challenge*

"The Court now turns to the question of whether the 'Cap' provision violates the Commerce Clause. This provision states that no commercial hazardous waste disposal facility which takes in more than

⁵ (1) the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*; (2) the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2601 *et seq.*; (3) the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*

100,000 tons of hazardous waste annually may dispose of more waste in the year starting October 1, 1991 than it disposed of during the statutory benchmark period, regardless of the origin of the waste. The position of CWM would allow it, and not the Alabama legislature, to determine what volume of hazardous waste will be buried permanently in the state. CWM insists that the Cap provision, like the fees, is an impermissible legislative interference with its rights to dispose of and to bury in Alabama whatever volume of such waste that it wishes. This Court disagrees, and concludes that the Cap provision is no more violative of the Commerce Clause than the Base Fee, and for many of the same reasons.

"The Cap provision applies equally to in-state and out-of-state waste. Accordingly, the *Pike v. Bruce Church* balancing test must be utilized to assess its validity under the Commerce Clause. Like the Base Fee, the Court finds that the Cap provision regulates evenhandedly to effectuate a legitimate local interest. Tonnage restrictions which apply equally to all waste, regardless of origin, do not violate the Commerce Clause. *Wetzel County Solid Waste Authority v. West Va. Div. of Natural Resources*, 401 S.E.2d 227 (W.Va. 1990). The state has a clear and legitimate interest in conserving its natural resources—the Selma chalk and the Eutaw aquifer—and in protecting the health and safety of its citizens. The state also has a legitimate interest in protecting the environment surrounding the Selma chalk and the Eutaw aquifer and in extending the life of the landfill for the benefit of in-state and out-of-state waste generators. The Cap provision promotes this interest without discrimination by limiting the amount of waste that can be disposed of at Emelle during any 12-month period. See *County of Washington v. Casella Waste Management, Inc.*, 1990 WL 208709

(N.D.N.Y. Dec. 6, 1990) (stating that local law prohibiting all out-of-county solid waste served a legitimate local purpose in protecting public health and safety as well as the environment, and noting that one of the legitimate effects of the local law might be to extend the useful life of safe landfills); and *Bill Kettlewell Excavating, Inc. v. Michigan Dept. of Natural Resources*, 732 F.Supp. 761 (E.D. Mich. 1990) (holding that statute requiring county approval for disposal of out-of-county solid waste served legitimate purpose of extending lives of the county's landfills). The Cap provision also furthers Alabama's legitimate interest in controlling health and safety risks by, in effect, regulating the amount of waste being transported on the state's highways and to its landfills. The Court again notes that land-filling is the least desirable form of waste disposal as it poses a perpetual threat to the ground and surface waters in the landfill's vicinity and to the surrounding environment. The Cap provision necessarily encourages the development of new technologies to supplement and minimize hazardous waste land-filling.

"Finally, any burden which the Cap provision might place on interstate commerce is speculative. The Cap limits the amount of waste in successive years only to that amount landfilled during the 1990-91 benchmark period. . . . Thus, the Cap creates no discriminatory burden on existing levels of commerce or on existing rates of waste generation and land-filling. The Cap provision permits increased volumes if such is warranted in accord with safety or to comply with State or federal regulations.⁹ Thus, the

⁹ "The Court notes that the Cap provision contains the following language: 'Provided, however, that the Governor or the Governor's designee may allow disposal of hazardous wastes or hazardous substances in excess of the tonnage disposed of during

Cap provision merely furthers the policy that future growth in the amounts of such waste to be disposed of must be accompanied by growth in the development and use of safer and more environmentally sound methods of disposal. (See § 9 of Act 90-326).

“(2) *The Supremacy Clause Challenge*

“CWM alleges that the Cap provision comes into conflict with three federal statutes: The Resource Conservation and Recovery Act (‘RCRA’), 42 U.S.C.A. § 6901 *et seq.*, which governs treatment and disposal of solid waste, the Toxic Substances Control Act (‘TSCA’), 15 U.S.C.A. § 2602 *et seq.*, which regulates the disposal of toxic wastes such as PCBs, and the Comprehensive Environmental Response Compensation, and Liability Act (‘CERCLA’), 42 U.S.C.A. § 9601 *et seq.*, which provides federal funding for cleanup of hazardous and toxic substances. CWM’s Emelle facility operates under permits issued in accordance with these federal statutes, and CWM argues that the Cap provision directly conflicts with either the provisions or the goals of all three. The Court disagrees, and will treat each statute in turn.

“(a) *The Cap Provision Does Not Conflict With, Frustrate, or Impede the Operation of RCRA.*

“RCRA, as amended in 1983, is a ‘cradle to grave’ regulatory program which sets standards for the generation, treatment, storage, and disposal of hazardous waste. RCRA is designed to promote several goals with regard to hazardous waste: 1) as-

the benchmark period if such action is determined by the Governor or the Governor’s designee to be necessary to protect human health or the environment in the state, or to allow the State to comply with its obligations to assure disposal capacity pursuant to applicable state or federal law as determined by the Governor or his designee.’ Act 90-326, § 9.”

suring that hazardous waste management is conducted in a way that protects human health and the environment; 2) requiring that hazardous waste be properly managed from the outside; and 3) minimizing the generation of hazardous waste and the landfilling of hazardous waste by encouraging process substitution, materials recovery, recycling, and treatment. 42 U.S.C.A. § 6902 (b).

“RCRA demonstrates a strong policy against landfilling. In the congressional findings accompanying the 1983 amendments, Congress found that ‘reliance on land disposal should be minimized or eliminated, and land disposal, particularly landfill and surface impoundment, should be the least-favored method for managing hazardous wastes. . . .’ 42 U.S.C.A. § 6910 (b) (7). Congress also maintained that alternatives to land disposal ‘must be developed.’ *Id.* at § 901 (b) (8). The floor debates which preceded the passage of the amendments repeatedly emphasized concerns about the dangers of landfill disposal. Congresswoman Schneider stated that the bill required a ‘direct economic disincentive for the land disposal of hazardous waste,’ and advocated supplementing the measure with ‘economic incentives that encourage alternatives to land disposal.’ 29 CONG. REC. pt 17 (1983), p. 23164. Congressman Walgren argued,

“‘In my view, our society should seriously question the continued land disposal of hazardous wastes. If we can find ways to dispose or neutralize hazardous waste instead of dumping it in the ground, we should. Ground disposal is inherently dangerous because subsequent contamination of liners in landfills can be penetrated with underground water. There are other ways to dispose of wastes that we should turn to. . . .’

Id. at p. 23163. Congressman Frenzel similarly stated, ‘continued reliance on land disposal of haz-

ardous wastes is a dangerous policy which threatens the health of Americans now and in the future.' *Id.* at p. 23161.

"In light of these concerns, this Court finds that the Cap provision is consistent with what the Congress had in mind when passing RCRA—reducing the amount of landfilled waste—and furthers, rather than frustrates the purpose of RCRA. The Cap provision is a mechanism which will encourage generators to find ways other than landfilling to dispose of their hazardous wastes, and this is exactly what Congress emphasized in RCRA.

"Further, RCRA directly addresses the question of federal/state supremacy. Section 6929 states that no state may impose treatment and disposal requirements less stringent than those prescribed in RCRA, and further states, 'Nothing in this chapter shall be construed to prohibit any state . . . from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations.' RCRA sets a floor, a minimum level of regulation by which all states must abide. State actions or regulations which go above that floor—which are more stringent than RCRA—are expressly permitted. The Cap provision, being more stringent than the requirements of RCRA, is clearly permissible. In short, there is no indication that the Cap provision conflicts with or impedes the operation of RCRA in any way.

"(b) *The Cap Provision Does Not Conflict With, Frustrate, or Impede the Operation of TSCA.*

"TSCA regulates the handling of toxic chemical substances and mixtures in an attempt to promote the promulgation of adequate data concerning the risks involved with such substances. In particular,

Congress wishes through TSCA to encourage technological innovation, while at the same time ensuring that such innovation did not 'present an unreasonable risk of injury' to health or the environment.' 15 U.S.C.A. § 2601(b)(3). Again, in light of this policy, the Court finds that the Cap provision, one effect of which will be to encourage the development of alternative disposal technologies while minimizing the amount of waste landfilled, does not 'stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting TSCA,' as CWM claims. In light of express congressional policy discouraging and disfavoring the practice of burying such highly dangerous materials in the ground, the Court cannot conceive that Congress, in enacting TSCA, intended to grant landfill operators a right to bury unlimited amounts of such materials. Nor does the Court find that such unlimited burial is necessary to the implementation of that Act.

"(c) *The Cap Provision Does Not Conflict With, Frustrate, or Impede the Operation of CERCLA.*

"[T]he primary purpose of CERCLA is the prompt cleanup of hazardous waste sites.' *State of Alabama v. United States Environmental Protection Agency*, 871 F.2d at 1557-58 (quoting *Dickerson v. Administrator, EPA*, 834 F.2d 974, 978 (11th Cir. 1987)). CERCLA allows the Administrator to promulgate regulations involving substances which, when released, could cause harm to the environment. 42 U.S.C.A. § 9602(a). It requires anyone who has knowledge of the release of such a substance greater than a designated amount to notify the United States government. 42 U.S.C.A. § 9603. Whenever such a release occurs, CERCLA authorizes the President to

remove the substance and/or provide for remedial action, or to take any other response 'consistent with the national contingency plan.' 42 U.S.C.A. § 9604 (a). Along with 26 U.S.C.A. § 9507, CERCLA establishes a trust fund, commonly known as 'Superfund,' to be used to pay costs incurred by the government in providing this help. 42 U.S.C.A. § 9611.

"CWM argues that the Fee Act's Cap provision artificially requires the Emelle facility to withhold capacity that otherwise would be available immediately for the disposal of waste generated at Superfund cleanup sites located outside of the State of Alabama, and that the provision 'undermines Congress's goal of making the best use of existing waste treatment and disposal facilities in the short term. CWM's argument is based on the assumption that Alabama has the burden under CERCLA of meeting the capacity assurance requirements of other states. This Court does not agree. CERCLA places the capacity assurance burden on the state *generating* the waste, not on the state importing it. Alabama is not required to provide enough capacity to dispose of all of the waste generated in the United States during the next twenty years; it has to assure the President only that it can provide capacity to dispose of *its own* waste during that period.

"Again, CWM is arguing that a statute designed to protect and promote health, safety and environmental quality indirectly evidences a congressional policy which directly conflicts with the *express* congressional policy against landfilling. CWM would have the Court construe CERCLA as being inconsistent with the policy clearly stated in another congressional enactment addressing the same general environmental quality concerns. This Court cannot find that Congress, in providing for clean-up of the results of past unsound waste disposal practices, in-

tended to imply a policy conflicting with its expressly stated condemnation of reliance on landfilling.

"(3) *The Due Process Challenge*

"Economic and social legislation, such as that involved herein, falls under the substantive component of the Due Process Clause, and the standard for evaluating its validity is virtually identical to the Equal Protection 'rational relationship' test. *In re Wood*, 866 F.2d 1367, 1371 (11th Cir. 1989).

" '[Economic and social legislation] generally will be upheld against a substantive due process attack unless the legislation "manifests a patently arbitrary classification, utterly lacking in rational justification." *Fleming v. Nestor*, 363 U.S. 603, 611 . . . (1960). As with the "rational relationship" test, *any* plausible reason supporting Congress' action in enacting the suspect legislation satisfies the "rational basis" test. *Id.* at 612, 80 S.Ct. at 1373.'

Id. (emphasis in the original). This Court's analysis of CWM's Due Process challenge to the Cap provision, therefore, is very similar to its analysis of CWM's Equal Protection claims.

"CWM contends that the Cap provision 'arbitrarily and irrationally' deprives it of its property interest in the Emelle facility in violation of the Due Process Clause. However, where, as here, restrictions on waste disposal are related to the state's goal of preserving and managing landfill space and in protecting the health and safety of its citizens, such restrictions do not violate due process. *Bill Kettlewell Excavating, Inc. v. Michigan Dept. of Natural Resources*, 732 F.Supp. 761, 765 (E.D. Mich. 1990). Moreover, the state's reasons for treating hazardous waste buried in commercial facilities differently from

industrial waste buried on site are rational and are not arbitrary. The Cap provision is rationally related to reducing the transportation and accumulation of hazardous waste and similar dangerous substances in the state. When such a rational basis for a statute exists, it does not violate the Due Process Clause.

"(4) *The Contracts Clause Challenge*

"Article I, section 10 of the federal Constitution makes it unlawful for states to impair the obligations of contracts. Although debtor relief laws were the primary focus of the Contracts Clause, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 502-503 (1987), the Clause has since been applied to other kinds of laws, including state laws that have the incidental effect of altering contractual obligations. See *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). A state statute does not violate the Contracts Clause 'simply because it has the effect of restricting, or even barring altogether, the performance of duties created by contracts entered into prior to its enactment.' *Exxon Corp. v. Eagerton*, 462 U.S. at 190. Rather, a court analyzing a Contracts Clause claim must employ a balancing test.

"First, the court must determine whether the state law has in fact substantially impaired the contractual relationship. *Spannaus*, 438 U.S. at 244.

" 'The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.'

Id. at 245. Second, if the law does substantially impair the contractual rights, the state must show that the law was designed to promote a legitimate public purpose, such as remedying a general social or economic problem. *Energy Reserves Group v. Kansas Power and Light Co.*, 459 U.S. 400, 411-412 (1983). Finally, if the statute is shown to have a legitimate public purpose, the state must show that the law is based on reasonable conditions and that it is of a character appropriate to the public purpose. *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 445-47 (1934). In making this determination, courts defer to the legislative judgment if the regulation involved is social or economic. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22-23 (1977).

"Applying the above analysis, the conclusion is clear that the Cap provision does not violate the Contracts Clause. First, CWM has made no showing that the Cap provision has impaired its existing contracts. Second, even had CWM presented some proof that the Cap provision impaired its existing contracts, it is clear that the law was designed to promote a legitimate public purpose. Finally, as discussed above, the Cap provision is based on reasonable conditions: it allows CWM and the out-of-state generators to determine the cap amount. Moreover, it is of a character to promote the public purpose—it will prevent the amount of hazardous waste buried in the state from increasing in subsequent years. All three elements of the test balance in favor of the Cap provision.

"(5) *The Takings Clause Challenge*

"Under the Fifth Amendment to the United States Constitution, government is prohibited from taking private property for public use without just compensation. The question to be answered in determining

whether the Takings Clause has been violated is whether the governmental action amounts to a 'taking' requiring compensation. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). To make this determination, a court must determine 1) whether there is a property interest involved, *see, e.g., Andrus v. Allard*, 44 U.S. 51, 65-66 (1979); and 2) whether that property interest has been diminished—in a case like the present one, whether there has been a diminution in the economic viability of the property by the state regulation, *see Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. at 485-86, or whether state infringement of the private property right was done in the legitimate exercise of Police Power or to advance a legitimate state interest and whether the infringement operates to further state interest and whether the infringement operates to further that interest, *see id.; Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). If the result of this analysis indicates that there has in fact been a taking, the remedy is generally payment of just compensation. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841-42 (1987).

"The Cap provision has not affected a 'taking' within the meaning of the Takings Clause. This Court has already established several times over the fact that the Cap provision—indeed, the Fee Act as a whole—advances legitimate state interests. It is equally clear that the Cap provision has not made it commercially impracticable for CWM to continue operating its Emelle facility. CWM still owns the Emelle facility in its entirety. Its use has not been changed or restricted; it is still a commercial hazardous waste disposal facility. Comparing, then, 'the value that has been taken from the property with the value that remains in the property,' *DeBenedictis*, 480 U.S. at 497, the Court concludes that

even if some diminution in value has occurred, it by no means would constitute a taking requiring compensation under the Takings Clause."

III.

We next consider whether Act No. 90-326 is a "revenue bill" enacted in violation of Article IV, § 70, of the Alabama Constitution. We again adopt the trial court's order as the decision of this Court as to this issue:

"The Challenge Under § 70 of the Alabama Constitution"

"The Court finds that enactment of the Fee Act did not violate Article IV, Section 70 of the Alabama Constitution. Article IV, section 70 of the Alabama Constitution provides:

"All bills for raising revenue shall originate in the house of representatives. The governor, auditor, and attorney general shall, before each regular session of the legislature, prepare a general revenue bill to be submitted to the legislature, for its information, and the secretary of state shall have printed for the use of the legislature a sufficient number of copies of the bill so prepared, which the governor shall transmit to the house of representatives as soon as organized, to be used or dealt with as that house may elect. The senate may propose amendments to revenue bills. No revenue bill shall be passed during the last five days of the session."

CWM asserts that the Fee Act is a revenue bill which was enacted during the last five days of the legislative session, and that the enactment thus violated the last sentence of Article IV, section 70.

"This Court finds that the Fee Act is not a 'revenue bill' within the meaning of section 70. In *Woco Pep Co. of Montgomery v. Butler*, 225 Ala. 256, 142 So. 509 (1932), the Alabama Supreme Court explained the meaning of the term 'revenue bill' as it appears in the last sentence of section 70. The Constitution of 1875 contained only the first sentence of the present section 70. When the provision was rewritten for the Constitution of 1901, the last three sentences were added, defining a 'general revenue bill' and explaining how such a bill was to be enacted. The Supreme Court considered the added sentences in conjunction with the remarks of the committee chairman who presented the revision to the Constitutional Convention, and came to the conclusion that the last sentence of section 70 'was intended by the Constitution makers to apply only to the general revenue bill.' *Id.* at 511 (emphasis added). The Court held that the fact that the Constitution makers revised the penultimate sentence of section 70 to authorize the Senate to propose amendments to the general revenue bill and to amend specific bills for raising revenue only strengthened its conclusion that the term revenue bill 'related exclusively to and affected general revenue bills.' *Id.* See also *Opinion of the Justices*, 270 Ala. 38, 115 So.2d 464, 467-68 (1959); *Opinion of the Justices*, 269 Ala. 676, 115 So.2d 484, 485 (1959); *Opinion of the Justices*, 259 Ala. 514, 66 So.2d 921, 923 (1953); *Dorsky v. Brown*, 255 Ala. 238, 51 So.2d 360, 362, cert. denied, 342 U.S. 818 (1951). Because the Fee Act is not a general revenue bill, but a specific measure, section 70 does not apply."

IV.

We next consider whether the trial court erred in holding that the Additional Fee of Act No. 90-326 discriminates against interstate commerce in violation of the Commerce Clause.

The Commerce Clause does not invalidate all state restrictions on commerce. "It has long been recognized that 'in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.' *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767, 65 S.Ct. 1515, 1519, 89 L.Ed. 1915 (1945)." *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670, 101 S.Ct. 1309, 1316, 67 L.Ed.2d 580, 586 (1981). The constitutionality of a state regulation depends upon "a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Id.*, quoting *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 at 441, 98 S.Ct. 787, at 794, 54 L.Ed.2d 664, at 673 (1978).

In *New Energy Co. v. Limbach*, 486 U.S. 269, at 278, 108 S.Ct. 1803, at 1810, 100 L.Ed.2d 302 (1988), the United States Supreme Court stated the test in which a facially discriminatory statute may be found to be valid under the Commerce Clause:

"Our cases leave open the possibility that a State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. See, e.g., *Maine v. Taylor*, 477 U.S. at 138, 151, 106 S.Ct., at 2447, 2455; *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. at 958; *Hughes v. Oklahoma*, 441 U.S., at 336-337, 99 S.Ct. at 1736; *Dean Milk Co. v. Madison*, 340 U.S., at 354, 71 S.Ct., at 297. This is perhaps just another way of saying that what may appear to be a 'discriminatory' provision in the constitutionally prohibited sense—that is, a protectionist enactment—may on closer analysis not be so. However it be put, the standards for such justification

are high. Cf. *Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S. Ct. 2531, 2535, 57 L.Ed.2d 475 (1978) ('where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected'); *Hughes v. Oklahoma*, 441 U.S., at 337, 99 S. Ct., at 1737 ('[F]acial discrimination by itself may be a fatal defect' and '[a]t a minimum . . . invokes the strictest scrutiny')."

In holding that the Additional Fee violates the Commerce Clause, the trial judge relied upon *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), and *National Solid Wastes Management Ass'n v. Alabama Dep't of Environmental Management*, 910 F.2d 713 (11th Cir. 1990), modified and reh'g denied, 924 F.2d 1001 (11th Cir. 1991), reh'g en banc denied, — F.2d — (April 15, 1991); *cert. denied*, — U.S. —, — S.Ct. — (1991) [59 U.S.L.W., 3821, 3823, 3783 (June 10, 1991) (No. 90-1718)].

In *National Solid Wastes Management Ass'n* the 11th Circuit Court of Appeals held the "Holley Bill," Act No. 89-788, Code of Ala. 1975, § 22-30-11 (Supp. 1990), invalid under the Commerce Clause. The Holley Bill banned disposal of hazardous waste in Alabama from a number of states. The Court of Appeals stated:

"Alabama's selective ban on out-of-state hazardous waste is no quarantine law. Alabama did not ban hazardous wastes from all other states on the ground that the wastes were dangerous to some human health or environment aspect which Alabama has a right to regulate. Alabama's ban does not distinguish on the basis of type of waste or degree of dangerousness, but on the basis of the state of generation."

Id., 910 F.2d at 721. Unlike the Holley bill, the Additional Fee provision of Act No. 90-326 has specifically been found by the legislature to be an effective way to

deal with health and environmental hazards to Alabamians created by hazardous waste imported here from other states. We believe that Alabama has a legitimate local interest which this Act legitimately serves, and is one that is permissible under the Commerce Clause.

The Supreme Court of the United States has not said that hazardous waste is an article of commerce. Assuming that it is an article of commerce, as the 11th Circuit Court of Appeals assumed, we believe that a statute such as the one before us, which advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives, can be valid under the Commerce Clause.

The trial court concluded that *City of Philadelphia v. New Jersey*, *supra*, compelled the conclusion that the legislation involved here was foreclosed by the Commerce Clause. We believe that that case is distinguishable under the facts here. That case involved a New Jersey statute that banned the movement of liquid or solid waste (but not hazardous waste) into the state. The purpose of that legislation was found to be economic protectionism, which was in violation of the Commerce Clause. CWM argues that the holding in *City of Philadelphia v. New Jersey* precludes state and local governments from responding to real and substantial public health and environmental dangers by controlling the importation of wastes. However, the United States Supreme Court cases make a distinction between state measures that discriminate arbitrarily against out-of-state commerce in order to give in-state interests a commercial advantage, i.e., simple economic protectionism, and state measures that seek to protect public health or safety or the environment. *Maine v. Taylor*, 477 U.S. 131, 148 n. 19 (1986).

In *City of Philadelphia v. New Jersey*, the Supreme Court made this distinction and decided that the New Jersey statute constituted economic protectionism, rather than a measure to protect the citizens of the state from

menaces to their health or safety. *City of Philadelphia v. New Jersey* does not hold that a state may not limit importation of wastes to protect health and the environment; it holds that a state may not do so for "simple economic protectionism." The Supreme Court has characterized *City of Philadelphia v. New Jersey* as involving "a state law purporting to promote environmental purposes" but is "in reality 'simple economic protectionism.'" *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981).

Mr. Justice Rehnquist, in his dissent in *City of Philadelphia v. New Jersey*, discussed the growing problem in our nation in the disposal of solid waste and the health and safety hazards associated with its disposal. There, in speaking not of hazardous waste, as in the present case, but of garbage, he noted that the United States Supreme Court has recognized that the States can enact quarantine laws, which "have not been considered forbidden protectionist measures, even though they were directed against out-of-state commerce." *Id.*, 437 U.S. at 631 (quoting the majority opinion, 437 U.S. at 628). Justice Rehnquist stated:

"The Court recognizes, ante [437 U.S. at 621-624], that States can prohibit the importation of items, 'which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of smallpox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption.'"

437 U.S. at 631. (Citations omitted.) Justice Rehnquist considered the quarantine law cases dispositive of the issue, and would have allowed a state to regulate solid wastes from out-of-state.

In *Maine v. Taylor*, 477 U.S. 131 (1986), the United States Supreme Court made it clear that environmental measures are entitled to greater deference than ordinary legislative acts. The Court upheld a facially discriminatory state statute that banned all importation of live baitfish. The Court stated:

"The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. As long as a State does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' . . . it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources. The evidence in this case amply supports the District Court's findings that Maine's ban on the importation of live baitfish serves legitimate local purposes that could not adequately be served by available non-discriminatory alternatives. This is not a case of arbitrary discrimination against interstate commerce; the record suggests that Maine has legitimate reasons 'apart from their origin, to treat [out-of-state baitfish] differently . . .'"

477 U.S. at 151-52.

The Supreme Court in *Maine v. Taylor* cited *City of Philadelphia v. New Jersey* for the proposition that "[s]hielding in-state industries from out-of-state competition is almost never a legitimate local purpose, and state laws that amount to 'simple economic protectionism' consequently have been subject to a 'virtually *per se* rule of invalidity,'" while stating that, in contrast to *City of Philadelphia v. New Jersey*, "there is little reason in this case to believe that the legitimate justifications the State has put forward for its statute are merely a sham or a '*post hoc* rationalization.'" *Maine v. Taylor*, 477 U.S. at 148-49.

The Additional Fee provision in the Act advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. It has not been enacted for the purpose of economic protectionism. In enacting the Additional Fee, the Alabama legislature was not banning the collection and acceptance of hazardous waste; it was merely asking the states that are using Alabama as a dumping ground for their hazardous wastes to bear some of the costs for the increased risk they bring to the environment and the health and safety of the people of Alabama. As in *Maine v. Taylor*, the problem is already with us. Millions of tons of hazardous wastes have been buried at Emelle. The State of Alabama has a legitimate justification, apart from their origin, for treating the out-of-state wastes differently.

Because this waste is *permanently* stored in Alabama, the risk to the health and safety of the people of Alabama will continue in perpetuity. The costs to the state of regulation and monitoring of the facility will continue in perpetuity. A disproportionate share of these costs will be borne by the taxpayers of the State of Alabama for the wastes dumped by other states.

The Additional Fee serves these legitimate local purposes that cannot be adequately served by reasonable nondiscriminatory alternatives: (1) protection of the health and safety of the citizens of Alabama from toxic substances; (2) conservation of the environment and the state's natural resources; (3) provision for compensatory revenue for the costs and burdens that out-of-state waste generators impose by dumping their hazardous waste in Alabama; (4) reduction of the overall flow of wastes traveling on the state's highways, which flow creates a great risk to the health and safety of the state's citizens.

The testimony before the trial court showed that in 1985 some 341,000 tons of hazardous waste were buried in the Emelle facility. By 1989 the tonnage had grown to 788,000 tons per year. While CWM estimates that

there is capacity for storage at Emelle for 100 years, the increase in tonnage has more than doubled in four years.

As the trial judge noted in his findings of fact:

"It is without dispute that the waste and substances being landfilled at the Emelle facility include substances that are inherently dangerous to human health and safety and to the environment. Such waste consists of ignitable, corrosive, toxic and reactive wastes which contain poisonous and cancer-causing chemicals and which can cause birth defects, genetic damage, blindness, crippling and death. Should a sudden or non-sudden discharge or release occur, hazardous wastes could pollute the environment, contaminate drinking water supplies, contaminate the ground water, and enter the food chain. Among these are arsenic, mercury, lead, chromium and cyanide. These wastes are generated by an entire spectrum of industry."

Unlike the situation in *City of Philadelphia v. New Jersey*, where there was questionable environmental concern, there is legitimate concern here in Alabama. There is no dispute that the wastes dumped at Emelle include known carcinogens and materials that are extremely *hazardous* and can cause birth defects, genetic damage, blindness, crippling, and death. These wastes are far more dangerous to the people of Alabama than rags infected with small-pox or yellow fever.

This Court takes judicial notice of the fact that there is a finite capacity for storage of hazardous waste at the Emelle facility and that the capacity is rapidly being reached. The record reflects that 85% to 90% of the tonnage that is *permanently* buried at Emelle is from out-of-state. There is nothing in the Commerce Clause that compels the State of Alabama to yield its total capacity for hazardous waste disposal to other states. To tax Alabama-generated hazardous waste at the same rate

as out-of-state waste is not an available non-discriminatory alternative, because Alabama is bearing a grossly disproportionate share of the burdens of hazardous waste disposal for the entire country. Here, the statute that creates the Additional Fee does not needlessly obstruct interstate trade, nor does it constitute economic protectionism. It is a responsible exercise by the State of Alabama of its broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.

The Commerce Clause is designed to promote national unity and discourage economic protectionism. However, as previously stated, statutes that are facially discriminatory can survive the strict scrutiny of Commerce Clause analysis. In *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159 (1985), the Supreme Court examined Massachusetts and Connecticut statutes forbidding banks outside the New England region from taking over in-state banks, while allowing New England banks to do so. The Court held that this was a legitimate state purpose.

For the reasons stated above, we hold that the Additional Fee provision of Act No. 90-326 is not invalid under the Commerce Clause of the United States Constitution. The Additional Fee does not needlessly obstruct interstate trade or attempt to place Alabama in a position of economic isolation. It merely retains Alabama's broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources. The evidence in this case amply supports the conclusion that the Additional Fee serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives. This is not a case of arbitrary discrimination against interstate commerce; the record suggests that Alabama has legitimate reasons, apart from their origin, to treat out-of-state wastes differently. The judgment of the trial court is therefore reversed as to this issue.

The final issue before the Court is whether the trial court erred in holding that Governor Hunt had standing to raise the issue of the constitutionality of the Cap provision. CWM contends that the complaint it filed challenged the constitutionality of the Base Fee and the Additional Fee. Governor Hunt filed a counterclaim, seeking to have the trial court declare the Cap provision constitutional. CWM argues that the Governor lacked standing to raise that issue and cites *Casey v. Travelers Ins. Co.*, 531 So.2d 846, 849 (Ala. 1988), wherein this Court stated: "Where a particular litigant is not within the group of persons effected by the statute or portion thereof which is allegedly unconstitutional, such litigant lacks standing to raise such constitutional issue." (Quoting *Fletcher v. Tuscaloosa Federal Savings & Loan Ass'n*, 294 Ala. 173, 178, 314 So.2d 51, 56 (1975).)

We find CWM's challenge to Governor Hunt's standing to be without merit. The Governor's counterclaim was filed only after CWM had sued him in a United States District Court, alleging that the Cap provision violated CWM's federally protected rights. Further, the trial court's jurisdiction over the question of the validity of the Cap provision was expressly invoked in CWM's original complaint alleging the invalidity of the entire Act. Thus, there existed a justiciable controversy that Governor Hunt, as a state official, had standing to raise in a counterclaim for a declaratory judgment. *Curry v. Woodstock Slag Corp.*, 242 Ala. 379, 6 So.2d 479 (1942).

For the reasons stated above, the judgment of the trial court is due to be affirmed as to all issues save the Additional Fee and reversed and the cause remanded as to the issue of the Additional Fee.

AFFIRMED IN PART; REVERSED IN PART;
AND REMANDED.

Hornsby, C. J., and Maddox, Almon, Adams, Steagall, and Ingram, JJ., concur.

Houston, J., concurs in the judgment.

HOUSTON, JUSTICE (concurring in the judgment).

Until the United States Supreme Court holds that hazardous waste (waste that the trial court found contained poisonous chemicals that can cause cancer, birth defects, genetic damage, blindness, crippling, and death) is an article of commerce protected by the Commerce Clause of the United States Constitution, I refuse to declare the additional fee provision of Act No. 90-326, which was duly enacted by the Alabama Legislature and approved by the Governor of Alabama, unconstitutional as violative of the Commerce Clause of the United States Constitution.

If the United States Supreme Court holds that waste containing poisonous chemicals that can cause cancer, birth defects, genetic damage, blindness, crippling, and death is an article of commerce protected by the Commerce Clause of the Constitution, then I am bound by that ruling under the Supremacy Clause of Article VI of the United States Constitution. Alabama lost that battle over 125 years ago; however, I do not believe that such waste is an article of commerce protected by the Commerce Clause, and I do not believe that the Alabama Supreme Court is bound by the decision of any *other* federal court on this issue. *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072 (7th Cir. 1970), cert. denied sub nom. *Lawrence v. Woods*, 402 U.S. 983, 91 S.Ct. 1658, 29 L.Ed.2d 148 (1971).

I can appreciate how Judge Phelps, a distinguished trial judge, could feel compelled to comply with a legal precedent of the 11th Circuit Court of Appeals, in the absence of an opinion on that point by this Court; however, "there is a parallelism but not paramountcy" between the 11th Circuit Court of Appeals and this Court, "for both . . . courts are governed by the same reviewing authority of the [United States] Supreme

Court.' " *United States ex rel. Lawrence v. Woods*, 432 F.2d at 1075, quoting the Supreme Court of New Jersey in *State v. Coleman*, 46 N.J. 16, 214 A.2d 393, 403 (1965), cert. denied, 383 U.S. 950, 86 S.Ct. 1210, 16 L.Ed.2d 212 (1966).

APPENDIX B

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

 Civil Action No. CV 90-1098

CHEMICAL WASTE MANAGEMENT, INC., PLAINTIFF

v.

THE ALABAMA DEPT. OF REVENUE; JAMES M. SIZEMORE, JR., as Commissioner of the ALABAMA DEPARTMENT OF REVENUE; GUY HUNT, as Governor of Alabama; CLAUDE EARL FOX, M.D., M.P.H., as State Health Officer; and the STATE BOARD OF HEALTH, DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Chemical Waste Management, Inc. ("CWM") filed this action against Guy Hunt, as Governor of the State of Alabama; James M. Sizemore, Jr., as Commissioner of the Alabama Department of Revenue; and the Alabama Department of Revenue. Claude Earl Fox, State Health Officer, and the State Board of Health later intervened. CWM seeks declaratory and injunctive relief to invalidate portions of Alabama Act No. 90-326, which was signed into law by the Governor on April 17, 1990. Governor Hunt has counterclaimed for declaratory relief seeking to uphold the fees and the annual limit or "Cap" provisions therein. Having considered the testimony, exhibits, numerous briefs filed by the parties, and the ap-

plicable law, the Court makes the following findings of fact and conclusions of law:

I. BACKGROUND

In April, 1990 the State of Alabama enacted Act No. 90-326 (the "Act"). The Act imposes, effective July 15, 1990, a base fee of \$25.60 per ton on all waste disposed of at commercial hazardous waste disposal facilities, regardless of the state of origin (the "Base Fee"). The Act imposes an additional fee of \$72.00 per ton on all hazardous waste generated outside the state and land-filled at such commercial hazardous waste disposal facilities (the "Additional Fee"). The Additional Fee required for hazardous waste generated out of state makes no distinction on the basis of type of hazardous waste, the degree of dangerousness or as to what hazard minimization measures may have been utilized for the out-of-state generated waste. In addition, Section 9 of the Act contains a provision which limits the annual amount of waste disposed of at any affected facility (those handling more than 100,000 tons annually) after July 14, 1991 to the amount disposed of from July 15, 1990 to July 14, 1991 (the "Cap" provision). This Cap provision applies to a total volume without distinction with regard to whether the waste was generated in or out of Alabama. CWM contends that both the Base Fee and Additional Fee violated the Commerce Clause of the Federal Constitution, the Equal Protection Clause of the Federal Constitution and its equivalents under the State Constitution, and the Due Process Clause of the State Constitution. CWM further contends that the Act is a "revenue bill" enacted during the last five days of the legislative session in violation of Article IV, Section 70 of the Alabama Constitution. Furthermore, CWM contends that the Cap provision violates the Commerce, Due Process, and Equal Protection Clauses of the Federal Constitution and is preempted by various federal statutes.

II. LEGISLATIVE FINDINGS AND LEGISLATION

Certain of the legislative findings underlying Act No. 90-326 are set forth as follows:

Act §1, Code § 22-30B-1.1 Legislative findings.

The legislature finds that:

- (a) The state is increasingly becoming the nation's final burial ground for the disposal of hazardous wastes and materials;
- (b) The volumes of hazardous wastes and substances disposed in the state have increased dramatically for the past several years;
- (c) The existence of hazardous waste disposal activities in the state poses unique and continuing problems for the state;
- (d) As the site for the ultimate burial of hazardous wastes and substances, the state incurs a permanent risk to the health of its people and the maintenance of its natural resources that is avoided by other states which ship their wastes to Alabama for disposal;
- (e) The state also incurs other substantial costs related to hazardous waste management including the costs of regulation of transportation, spill cleanup and disposal of ever-increasing volumes of hazardous wastes and substances;
- (f) Because all waste and substances disposed at commercial sites for the disposal of hazardous waste and hazardous substances, whether or not such waste and substances are herein defined as hazardous, contribute to the continuing problems created for the state, and because state and federal definitions of "hazardous wastes" have regularly changed and are likely to change in the future to include waste not previously defined as hazardous, it is necessary that

all waste and substances disposed of at a commercial site for the disposal of hazardous waste or hazardous substances be included within the requirements of this act;

(g) The legislature finds that the public policy of the state is to encourage business and industry to develop technology that will eliminate the generation of hazardous waste and substances. . . .;

* * * *

(h) Since hazardous wastes and substances generated in the state compose a small proportion of those materials disposed of at commercial disposal sites located in the state, present circumstances result in the state's citizens paying a disproportionate share of the costs of regulation of hazardous waste transportation, spill cleanup and commercial disposal facilities. Persons, firms or corporations which generate and dispose of such waste and substances in Alabama presently are among the taxpaying citizens of this state who must bear the burden of regulation, inspection, control and clean-up of hazardous waste sites; addressing the public health problems created by the presence of such facilities in the state; and, preserving this state's environment while those generating this waste in other states and shipping it to Alabama for disposal presently are not. This act attempts to resolve that inequity by requiring all generators of waste being disposed of in Alabama to share in that financial burden.

(i) The operators of commercial sites for the disposal of hazardous wastes or hazardous substances have the ability to control the flow of said wastes or substances into said sites. Further, said operators, by exercise of said ability to control the flow of wastes or substances disposed at sites during a twelve-month period, only to enlarge the amount of wastes disposed during the next twelve-month period

by a proportionate amount. The health of the population of this state and the soundness of the environment of this state are and would be threatened by such an exercise of control. Said exercise of control could cause an artificial decrease in fees during the twelve-month period beginning July 15, 1990, and ending July 14, 1991. To prevent threats to the health of the population of this state and to the soundness of the environment of this state and to prevent an artificial decrease in fees during the twelve-month period beginning July 15, 1990, and ending July 14, 1991, this act provides a cap on the amount of hazardous waste and hazardous substances disposed during the twelve-month period beginning October 1, 1991, said cap being a function of the amount of hazardous waste and hazardous substances disposed during the twelve-month period beginning July 15, 1990, and ending July 14, 1991.

* * * *

The pertinent provisions of Act No. 90-326 are set out as follows:

Act § 3(a), Code § 22-30B-2(a) (the "Base Fee"):

In addition to other fees levied, there is hereby levied a fee to be paid by the operators of each commercial site for the disposal of hazardous waste or hazardous substances in the amount of \$25.60 per ton for all waste or substances disposed of at such site.

Act § 3(b), Code § 22-30B-2(b) (the "Additional Fee"):

For waste and substances which are generated outside of Alabama and disposed of at a commercial site for the disposal of hazardous waste or hazardous substances in Alabama, an additional fee shall be levied at the rate of \$72.00 per ton.

Act § 9, Code § 22-30B-2.3 (the "Cap Provision"):

Any commercial site for the disposal of hazardous waste or hazardous substances that disposes of in excess of 100,000 tons of hazardous waste or hazardous substances during the twelve-month period beginning July 15, 1990, and ending July 14, 1991, (hereinafter referred to as the benchmark period) shall not, during any twelve-month period beginning October 1, 1991, and any twelve-month period thereafter, dispose of more than the tonnage received during said benchmark period. Such restriction shall be in addition to any other ban or restrictions on disposal imposed by any regulatory authority. Provided, however, that the Governor or the Governor's designee may allow disposal of hazardous wastes or hazardous substances in excess of the tonnage disposed of during the benchmark period if such action is determined by the Governor or the Governor's designee to be necessary to protect human health or the environment in the state, or to allow the state to comply with its obligations to assure disposal capacity pursuant to applicable state or federal law as determined by the Governor or his designee.

Act § 2, Code § 22-30B-1 (Definitions):

(3) HAZARDOUS SUBSTANCE(S). Any substance defined as a hazardous substance pursuant to 42 U.S.C. § 9601(14), as amended, or listed as a hazardous waste pursuant to the Code of Alabama 1975, Section 22-30-10, as amended.

(4) HAZARDOUS WASTE(S). Those wastes defined at Section 22-30-3(5), Code of Alabama 1975, as amended, or listed pursuant to Section 22-30-10, Code of Alabama 1975, as amended, or department regulations.

III. FINDINGS OF FACT

1. Based on statements and representations made by the parties during pretrial proceedings, the Court accepts the legislative findings supporting Act No. 90-326. In addition, the Court finds that the evidence at trial adequately supports the legislative findings. The Court further finds that the Base Fee and Cap provisions of Act No. 90-326 which this Court determines and finds to be constitutionally permissible are integral parts of a regulatory procedure which appropriately addresses the concerns expressed by the Alabama Legislature when it enacted the "Hazardous Wastes Management Act of 1978." The following statement of Legislative Finding, Purpose and Intent is set forth in this 1978 legislation:

Section 2. Legislative Finding, Purpose and Intent —The Legislature finds that increasing quantities of hazardous wastes are being generated in the State and that without adequate safeguards from the point of generation through handling, processing and final disposition, such wastes can create conditions which threaten human or animal health and the environment. The Legislature, therefore, declares that in order to minimize and control any such hazardous conditions it is in the public interest to establish and to maintain a statewide program to provide for the safe management of hazardous wastes.

Acts 1978, 2nd Ex.Sess., No. 129, p. 1843.

A. *The Emelle Facility*

2. CWM is a Delaware corporation with its principal place of business in Oak Brook, Illinois. CWM is the owner and operator of one of the nation's oldest and largest commercial hazardous waste land disposal facilities located in Emelle, Alabama (the "Emelle facility"). The Emelle facility is a hazardous waste treatment, storage, and disposal facility operating pursuant to a permit

issued by the Environmental Protection Agency ("EPA") under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.* ("RCRA") and the Toxic Substances Control Act, 15 U.S.C. §§ 2601 *et seq.* ("TSCA"). In addition, the Emelle facility is authorized to operate under state law pursuant to interim status authority granted under Alabama Code §§ 22-30-12(i). The Emelle facility is the only commercial hazardous waste landfill facility currently in operation in the State of Alabama.

3. In a 1973 study, EPA identified 74 potential sites for hazardous waste landfills throughout the country, of which Emelle was one. Although hazardous waste landfills can be designed and engineered to operate in practically every state of the United States, only a very few commercial sites presently exist. Efforts to obtain permits for new sites in other states are resisted by citizens of those states.

4. According to the testimony presented at trial, only one additional hazardous waste landfill has been permitted in the United States since the effective date of RCRA, November 17, 1980. That facility, in Last Chance, Colorado, has never operated or accepted waste and is presently for sale.

B. *The Increasing Volumes of Out-of-State Wastes at Emelle*

5. Increasing amounts of out-of-state hazardous wastes are being shipped to Emelle for permanent storage from in-state generators and from those in states throughout the country. The following tonnage has been received by Emelle in the years indicated:

1985	341,000 tons
1986	456,000 tons
1987	564,000 tons
1988	549,000 tons
1989	788,000 tons

The increase in tonnage has resulted in a significant increase in problems with regard to regulating and supervising the disposal of hazardous waste at Emelle. Eighty-five to ninety percent of the tonnage permanently buried at Emelle is from out-of-state. Emelle received two years ago approximately 17% of all hazardous wastes commercially landfilled in the United States.

6. CWM estimates there is capacity at Emelle for another 100 years of operation. CWM has admitted that without the restrictions imposed by the Alabama legislature, "the total annual demand for disposal capacity at the Emelle facility for hazardous waste generated out-of-state is projected to increase annually." (Paragraph D of Answer of CWM to Defendant Hunt's Counterclaim).

7. A portion of the wastes coming to Emelle are classified as non-hazardous. Some of these non-hazardous industrial wastes are sent to the Emelle facility by industries which may be seeking to reduce their own liability should these wastes become classified as hazardous wastes in the future. Additionally, these non-hazardous wastes are commingled with the hazardous wastes that are landfilled at the Emelle facility and therefore for the purposes of long-range monitoring and potential cleanup, must be treated as hazardous waste in any event. EPA, moreover, has made limited progress in identifying hazardous wastes to be regulated and does not know whether it has identified 10% or 90% of existing hazardous wastes. As a result, wastes which today are deemed non-hazardous may very well in the future be deemed hazardous for one reason or another.

C. The Permanent Risks and Costs of Hazardous Waste Landfilling

8. It is without dispute that the wastes and substances being landfilled at the Emelle facility include substances that are inherently dangerous to human health

and safety and to the environment. Such waste consists of ignitable, corrosive, toxic and reactive wastes which contain poisonous and cancer causing chemicals and which can cause birth defects, genetic damage, blindness, crippling and death. Should a sudden or non-sudden discharge or release occur, hazardous wastes could pollute the environment, contaminate drinking water supplies, contaminate the ground water, and enter the food chain. Among these are arsenic, mercury, lead, chromium and cyanide. These wastes are generated by an entire spectrum of industry.

9. Landfilling is the least desirable means of hazardous waste disposal. Many hazardous wastes remain in the environment and do not break down. Although some wastes degrade or can be made less hazardous through treatment, many substances remain hazardous forever.

10. Although hazardous wastes are now required to be solidified before being placed in a landfill, seepage of groundwater and surface water into closed trenches at Emelle containing liquid or solidified wastes creates a poisonous liquid known as leachate. Scientists are continuing to learn more about leachate and water pressures. As concluded in the August, 1983 report to CWM by Golder Associates, the accumulation of leachate in closed trenches will result in a "vertical head difference serving] as the driving force which will eventually cause exfiltration of fluid within the landfill trenches outward into the surrounding chalk." The testimony at trial was that it appears that leakage has already occurred with respect to at least some of the closed trenches. Leachate is presently pumped only from closed Trench 19 and open Trench 21. It is stored in above ground storage tanks with a capacity of 5 million gallons. From 10 million to 15 million gallons annually of leachate and surface water are gathered, stored and transported from Emelle at a cost of \$2 to \$3 million.

11. EPA has found that absolute prevention of migration of hazardous waste through synthetic trench liners is beyond the current technical state of the art, and that some migration will occur. The liners will probably retard migration only for the relatively short-term measured in tens of years. Although it appears that leachate is already seeping into the Selma chalk, it is uncertain how far it has moved and at what rate it will travel. There are widely varying estimates as to travel time. A November, 1987 joint report of the hazardous waste Ground-Water Task Force of EPA and the Alabama Department of Environmental Management ("ADEM") entitled "Evaluation of Chemical Waste Management, Inc., Emelle, Alabama", stated at page 30 as follows:

"The transit time through the Selma chalk ('to the Eutaw Formation. . . uppermost aquifer') was estimated by CWM to be 10,000 years. Independent EPA estimates of transit time using conservative estimate for equation variable were 330 years and 3,000 years for estimates using Darcy's Equation and a 2-D solute transport model, respectively. . . ."

Those transit time estimates all involve complicated calculations based upon highly variable factors.

12. The evidence shows that possibly a more serious concern is the lateral migration of leachate from the trenches following the downward gradient to the drainage areas leading to Bodka Creek, a tributary of the nearby Noxubee and Tombigbee Rivers. Although the closed trenches studied by Golder Associates in a August, 1990 report range from 50 to 150 feet apart, a CWM expert witness testified it would not surprise him if there were a migration of fluid from some of the closed trenches to other closed trenches; that there probably is some interconnection between those trench walls; and that fluid could move along the near surface defects in the downgradient direction.

13. The Selma Group Chalk Formation, in which the Emelle facility is located, extends across the states of Alabama, Mississippi, Arkansas and Texas. Although the chalk generally is of low permeability and is potentially suitable for the geological containment of hazardous wastes, the geologic integrity of the chalk also depends on the permeability of fractures, faults and other discontinuities. Faults and fractures exist throughout the Selma chalk at Emelle through which the leakage of hazardous waste and leachate may be greatly facilitated. Dr. Richard Groshong, a geology professor at the University of Alabama, testified that the faults and fractures may accelerate travel time through the Selma chalk by several orders of magnitude. According to Dr. Groshong, these rates "are important on a human time scale as opposed to a geological time scale." Tom Joiner, a former State Geologist, agreed that a "brittle fault" might speed the migration of leachate through the Selma chalk.

14. Dr. Groshong testified that there is a further need to identify, map, and study the faults and fractures at the Emelle facility. However, there will always be uncertainty with respect to the faults and fractures.

15. To monitor leachate and hazardous waste leakage, CWM has been required to install a large number of monitoring wells at Emelle. Periodic checks of those monitoring wells will be required forever. One CWM witness estimated the present annual costs of that monitoring system is between \$100,000 and \$200,000. Another CWM official estimated monitoring costs of Emelle to be in excess of \$1½ million per year. It is doubtful that monitoring wells can be placed in sufficient locations to monitor all the movement of water as such monitoring may prove to be impractical. Thus, the uncertainty of whether all contamination will be detected will likely remain. Indeed, the existence of monitoring wells creates new conduits for hazardous wastes to reach underlying groundwater.

16. The Emelle facility is within an earthquake risk zone as designated by the Alabama Emergency Management Agency. There was testimony to the effect that earthquakes pose an uncertain short and long range risk to the Emelle facility. In 1886 an earthquake in Sumter County caused a one-half foot movement in the ground surface. There was evidence that, depending upon its severity, an earthquake could unseal cracks in the chinks and open avenues for the movement of leachate and hazardous wastes.

D. *Transportation and Spills*

17. In 1989, approximately 40,000 truckloads of wastes were transported over the public highways to the Emelle facility of which approximately 34,000 to 36,000 were from out of state. As in the operation of the facility, transportation of these wastes, no matter how elaborate the precautions, also creates unquantifiable risk or uncertainty to the public health and to the environment.

Some trucks destined for Emelle have been involved in accidents causing hazardous waste to be spilled or released into the environment. Additionally, several incidents of releases of hazardous wastes and noxious fumes have already occurred at the facility. These risks are increased by the increasing volumes. The hazardous wastes landfilled at the Emelle facility are inherently dangerous in their transportation and movement into or from one place to another throughout the State of Alabama. That movement into and through the State of Alabama carries the potential and risk of spills, accidents and explosions that could release toxic fumes and contaminate the groundwater and/or surface water. The increasing volumes have increased the risks and liability involved in that transportation.

E. *Permanence of Dangers and Financial Risks*

18. Although it will be necessary to monitor, regulate, maintain (including the pumping, collection, stor-

age, transportation and disposal of leachate from the trenches), and secure the facility forever, CWM has made no provision for the payment of such costs beyond a period of 30 years after closure. Additionally, there has been no provision for the payment of any abatement, corrective, or remediation costs, compliance monitoring, third-party damages or natural resource damage.

19. Whenever CWM's planned or unplanned cessation of activities at Emelle occurs, there will be substantial financial and environmental risks to the people, businesses, and corporations of Alabama.

20. Alabama has a legitimate interest in guarding against the various imperfectly understood environmental risks posed by the storage of large quantities of hazardous wastes in Alabama, as well as the risks which may be more easily identified.

F. *The Legislative Classifications*

21. The CWM hazardous waste facility at Emelle currently is the only commercial hazardous waste landfill in Alabama. Of the 788,000 tons of waste landfilled at Emelle during 1989, 68,000 to 69,000 tons were generated in-state, or 8.6% of the 1989 total.

22. There is only one, relatively small non-commercial hazardous waste landfill facility presently permitted for hazardous waste in Alabama. It is in Washington County, and it accepts only on-site generated hazardous waste of approximately 4000 tons a year.

23. Closed non-commercial hazardous waste landfills (such as Sanders Lead in Troy) are not comparable to Emelle. They only accepted on-site generated hazardous waste and are no longer in operation.

24. Non-commercial hazardous waste facilities are not comparable to commercial hazardous waste facilities. Commercial facilities are likely to involve the transportation of wastes from off-site locations, and the accumu-

lation and disposal of relatively large quantities of hazardous wastes; most non-commercial facilities dispose of wastes on-site, and generally do not involve transportation. The amounts generated and disposed of at non-commercial facilities are far smaller than amounts disposed of at commercial facilities. Accordingly, the public health and safety risks associated with commercial hazardous waste facilities are much greater than those associated with non-commercial facilities.

25. Incinerators are not comparable to commercial hazardous waste landfills. Incinerators permanently destroy hazardous waste, leaving only a small residue which must be landfilled.

26. Should additional commercial hazardous waste landfills be permitted in Alabama, and meet the statutory criteria, the provisions of Act 90-326 would apply to them just as they apply now to CWM.

IV. CONCLUSIONS OF LAW

A. *The Base Fee*

(1) *The Commerce Clause Challenge*

As a threshold matter, the Court concludes that the Base Fee regulates evenhandedly and without regard to origin. The Base Fee effectuates a legitimate local interest. The legislature found, among other things, that: the volume of hazardous wastes being disposed of in Alabama has increased dramatically; the state incurs a permanent risk to the health of its people and the maintenance of its natural resources; and Alabama incurs substantial economic costs related to hazardous waste management such as regulatory costs and spill cleanup. Additionally, the evidence at trial documented specific threats to human health and the environment posed by the Emelle facility. Clearly, the state of Alabama has a legitimate interest in imposing fees on commercial haz-

ardous waste facilities to address the serious financial, environmental and other risks they create.

It is well-settled that states' regulatory powers are greatest when they address traditional matters of local concern such as environmental and natural resource regulation. *Kassel v. Consolidated Freightways*, 450 U.S. 662, 670, 101 S.Ct. 1309, 67 L.Ed.2d 580, 586 (1981). Legislative measures enacted to promote public health and safety are accorded particular deference. *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 443, 98 S.Ct. 787, 54 L.Ed.2d 664, 676 (1978). Challenges to state public safety regulations must overcome a "strong presumption of their validity." *Id.*, 434 U.S. at 444, 98 S.Ct. at 795, 54 L.Ed.2d at 667. Courts will not second-guess legislative judgments about the importance of safety justifications in comparison with the burdens on interstate commerce. *Kassel*, 450 U.S. at 670, 67 L.Ed.2d at 587. States retain broad authority under their general police powers to regulate matters of legitimate local concern even though interstate commerce is affected. *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

When a police power regulation is challenged under the Commerce Clause, one of two tests is applied. If the regulation is discriminatory on its face or in practical effect, the state must show that (1) the regulation has a legitimate local purpose; (2) the regulation serves this interest; and (3) reasonable nondiscriminatory alternatives, adequate to preserve the legitimate local purpose, are not available. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). This is the "strict scrutiny" test.

If no facial discrimination is involved, a "balancing test" is applied to determine the constitutional validity of statutes:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be

upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Pike v. Bruce Church, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). If a legitimate local purpose exists, "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.*

CWM has failed to establish that the Base Fee has discriminatory effects on interstate commerce. The mere fact, as CWM argues, that most of its customers are out-of-state generators does not establish discrimination against interstate commerce. The United States Supreme Court has stated that even if the burden of a state regulation falls most often on out-of-state companies, this burden "does not, by itself, establish a claim of discrimination against interstate commerce." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987); see also *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981); *Exxon Corp. v. Gov. of Maryland*, 437 U.S. 117, 126 (1978). The strict scrutiny test does not apply in these circumstances.¹

The Base Fee does not facially discriminate against out-of-state waste. All waste disposed of at Alabama commercial hazardous waste facilities is subject to the \$25.60 fee. Consequently the *Pike v. Bruce Church* balancing test will be applied to assess the fee's constitu-

¹ The Court deems irrelevant any evidence attributing to any state officials any motive discriminating against interstate commerce. It is well-established that "[i]nquiries into [lawmakers'] motives or purposes are a hazardous matter What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, . . ." *United States v. O'Brien*, 391 U.S. 367, 383-84, 88 S.Ct. 1673, 1682-83, 20 L.Ed.2d 672, 684 (1968), cited in, *CECOS International, Inc. v. Jorling*, 895 F.2d 66, 73 (2d Cir. 1990).

tional validity. In balancing the interests at stake, the Court finds that the burden the Base Fee imposes on interstate commerce is not clearly excessive in relation to the benefits it produces. The fee benefits the state, on the other hand, by compensating it for the financial responsibilities and risks it bears on account of commercial hazardous waste disposal activities. Thus, a comparison of the Base Fee's local benefits to its alleged burden on interstate commerce establishes that any such burden is not clearly excessive. Furthermore, to the extent that the Base Fee does deter hazardous waste land-filling, the fee is a proper instrument of deterrence.² Finally, in view of the financial, safety, environmental and other objectives of Act No. 90-326 and the fact that the Base Fee falls evenhandedly on interstate and intrastate waste, it is difficult to imagine how these objectives could be accomplished in ways that have a lesser impact on interstate activities.

For these reasons, CWM's Commerce Clause challenge to the Base Fee is without merit.

(2) *The Equal Protection Challenge*

The Equal Protection Clause of the United States Constitution and similar provisions of the Alabama Constitution prohibit the State of Alabama from denying any person equal protection of the law. There is a "presumption of constitutionality which can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364-65 (1973). See also *White v. Reynolds Metals Co.*, 558 So.2d 373 (Ala. 1989). "The burden is on the one attacking the legislative arrange-

² Similarly, in the forms which the EPA submits in connection with its waste reduction program, the agency asks states to list measures they are taking to reduce the generation of waste; the EPA lists fees as one example of such measure.

ment to negative every conceivable basis which might support it." *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). Unless the state statute involves a suspect class or a fundamental right, courts generally will not overturn the statute on equal protection grounds "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the legislature's actions were irrational." *Pennell v. San Jose*, 485 U.S. 1, 14 (1988) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)). The statute must be "rationally related to a legitimate state interest." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 81, 108 S.Ct. 1645, 100 L.Ed.2d 62, 74 (1988) (quoting *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985)). If the state legislature's determination that its regulation will serve a legitimate public purpose is "at least debatable," the challenge to that action must fail. *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938). "[C]ourts are not empowered to second-guess the wisdom of state policies." *Western & Southern Life Ins. Co. v. Board of Equalization*, 451 U.S. 648, 670 (1981). This "rational relationship" test is not difficult to pass. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985). Additionally, state regulations dealing with health, welfare and the economy are entitled to deferential Equal Protection review. *Evergreen Waste Systems, Inc. v. Metropolitan Service District*, 643 F. Supp. 127, 133 (D.Or. 1986) (citing *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976)); *Railway Express Agency v. New York*, 336 U.S. 106 (1949)). State tax legislation is given great deference. *White v. Reynolds Metals Co.*, 558 So. 2d at 380. States are free to impose taxes on different trades and professions, and may vary the tax rates on different products. *Id.* (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527-27 (1959)). Because the Base Fee provision involves neither a suspect class, such as race, nor a funda-

mental right, such as free speech, this Court must analyze the statute under the above-described, lenient "rational relationship" test, see *Exxon Corp. v. Eagerton*, 462 U.S. 176, 195-96 (1983), asking 1) whether the provisions have a legitimate purpose, and 2) whether it was "reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose. . . ." *Western & Southern Life Ins. Co.*, 451 U.S. at 668.

CWM argues that the Base Fee deprives it of equal protection of the law because it only applies to commercial hazardous waste facilities, and its Emelle operations constitute the only such facility in Alabama. The Court does not agree with this contention. First, the Court does not agree with the implication that CWM has somehow been "singled out" because the Base Fee, as a practical matter, only applies to it. There is no evidence to suggest that Act No. 90-326 will not apply to commercial hazardous waste facilities which are sited in Alabama in the future. Until that time, any regulation of commercial hazardous waste facilities will necessarily fall on CWM alone. This fact, however, does not prevent the legislature from regulating CWM's operations.³

Second, the Court finds that the legislature's treatment of commercial hazardous waste facilities differently from non-commercial facilities is rationally related to legitimate state interests. The evidence at trial established several reasons for the differentiation. For example, the use of commercial disposal sites poses unique health and safety risks, such as the transportation of dangerous materials to the sites with the risk of accidents involv-

³ CWM's claim that the legislature was motivated by improper motivations is also irrelevant for equal protection purposes. "[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of those who voted for it." *Palmer v. Thompson*, 403 U.S. 217, 224, 91 S.Ct. 1940, 1944, 29 L.Ed.2d 438 (1971), cited in *CECOS International v. Jorling*, *supra*, 895 F.2d at 73.

ing such transportation, and the accumulation in one place of extremely large volumes of different types of waste. The number of trucks delivering hazardous waste to the Emelle facility alone was approximately 40,000 during 1989, and was expected to increase in subsequent years. Hazardous waste disposal at non-commercial facilities, however, does not involve transportation of the materials to be disposed of, with the dangers inherent in and unique to such transportation. Such facilities dispose of their waste on-site. In *CECOS International, Inc. v. Jorling*, 895 F.2d 66 (2d Cir. 1990), the plaintiffs argued that a state law requiring siting board approval for the expansion of commercial, but not non-commercial, hazardous waste facilities violated equal protection. The Second Circuit rejected this argument because the state provided several reasons for applying this requirement to commercial facilities. The reasons included the fact "*that there are greater risks associated with commercial facilities because hazardous wastes must be transported to the off-site commercial facility.*" *Id.* at 73 (emphasis supplied). The State of Alabama has offered similar reasons for the classification now before the Court.

Moreover, commercial landfill facilities comprise the bulk of the hazardous waste accumulation problem. The waste disposed of at commercial facilities exceeds many times the waste disposed of on site by non-commercial facilities. Additionally, without regard to the health, safety and environmental concerns, and viewing the fees simply as taxes, the legislature is not precluded from taxing a commercial transaction simply because it does not impose the tax on a similar noncommercial activity. Many constitutionally permissible tax measures treat different taxable entities in different ways.

Thus, CWM has failed to meet its burden of negating every conceivable basis which might support Act No. 90-326's differing treatment of commercial and non-

commercial facilities. *White v. Reynolds Metals Co., supra*. The differentiation serves a legitimate purpose and it was reasonable for the legislature to believe that the classification promotes that purpose. This Court, therefore, must defer to the legislature's classification of these two types of facilities.

(3) *The Due Process Challenge*

Article I, section 6 of the Alabama Constitution states, among other things, that no accused in a criminal prosecution shall be deprived of life, liberty, or property except by due process of law. This right has been extended to civil trials. *Ross Neely Express, Inc. v. Alabama Dep't of Environmental Management*, 437 So. 2d 82, 84 (Ala. 1983). In order to avoid violating the Due Process Clause of the Alabama Constitution, a legislative classification must be reasonable and not arbitrary. *White v. Associated Industries of Alabama, Inc.*, 373 So. 2d 616, 617 (Ala. 1979).

The Base Fee is reasonable in function. It provides some financial assurance against the risks associated with materials posing a permanent threat to health, safety and the environment. The burden imposed is not an excessively heavy one. While CWM's right to maximize profits is certainly important, it does not by any stretch of the imagination outweigh the state's interest in protecting the health and safety of its citizens and environment. Under any kind of "rational and reasonable" analysis, therefore, the Base Fee is clearly valid.

B. *THE CAP PROVISION*

(1) *The Commerce Clause Challenge*

The Court now turns to the question of whether the "Cap" provision violates the Commerce Clause. This provision states that no commercial hazardous waste disposal facility which takes in more than 100,000 tons of

hazardous waste annually may dispose of more waste in the year starting October 1, 1991 than it disposed of during the statutory benchmark period, regardless of the origin of the waste. The position of CWM would allow it, and not the Alabama legislature, to determine what volume of hazardous waste will be buried permanently in the state. CWM insists that the Cap provision, like the fees, is an impermissible legislative interference with its rights to dispose of and to bury in Alabama whatever volume of such waste that it wishes. This Court disagrees, and concludes that the Cap provision is no more violative of the Commerce Clause than the Base Fee, and for many of the same reasons.

The Cap provision applies equally to in-state and out-of-state waste. Accordingly, the *Pike v. Bruce Church* balancing test must be utilized to assess its validity under the Commerce Clause. Like the Base Fee, the Court finds that the Cap provision regulates evenhandedly to effectuate a legitimate local interest. Tonnage restrictions which apply equally to all waste, regardless of origin, do not violate the Commerce Clause. *Wetzel County Solid Waste Authority v. West Va. Div. of Natural Resources*, 1990 WL 257380 (W.V.Sup.Ct. of Appeals, Dec. 19, 1990). The state has a clear and legitimate interest in conserving its natural resources—the Selma chalk and the Eutaw aquifer—and in protecting the health and safety of its citizens. The state also has a legitimate interest in protecting the environment surrounding the Selma chalk and the Eutaw aquifer and in extending the life of the landfill for the benefit of in-state and out-of-state waste generators. The Cap provision promotes this interest without discrimination by limiting the amount of waste that can be disposed of at Emelle during any 12-month period. See *County of Washington v. Casella Waste Management, Inc.*, 1990 WL 208709 (N.D.N.Y. Dec. 6, 1990) (stating that local law prohibiting all out-of-county solid waste served a legitimate local purpose in protecting public health and

safety as well as the environment, and noting that one of the legitimate effects of the local law might be to extend the useful life of safe landfills); and *Bill Kettlewell Excavating, Inc. v. Michigan Dept. of Natural Resources*, 732 F.Supp. 761 (E.D.Mich. 1990) (holding that statute requiring county approval for disposal of out-of-county solid waste served legitimate purpose of extending lives of the county's landfills). The Cap provision also furthers Alabama's legitimate interest in controlling health and safety risks by, in effect, regulating the amount of waste being transported on the state's highways and to its landfills. The Court again notes that landfilling is the least desirable form of waste disposal as it poses a perpetual threat to the ground and surface waters in the landfill's vicinity and to the surrounding environment. The Cap provision necessarily encourages the development of new technologies to supplement and minimize hazardous waste landfilling.

Finally, any burden which the Cap provision might place on interstate commerce is speculative. The Cap limits the amount of waste in successive years only to that amount landfilled during the 1990-91 benchmark period. This Court in this opinion finds the \$72.00 Additional Fee on out-of-state generated waste to be unconstitutional. The Court in the relief portion of this opinion specifically holds that the volume cap for future years may not be based on a benchmark period which includes any time during which the unconstitutionally discriminatory fee was assessed. As noted in the relief section, a new benchmark period may be required. Thus, the Cap creates no discriminatory burden on existing levels of commerce or on existing rates of waste generation and landfilling. The Cap provision permits increased volumes if such is warranted in accord with safety or to comply with State or federal regulations.⁴ Thus, the Cap pro-

⁴ The Court notes that the Cap provision contains the following language: "Provided, however, that the Governor or the Governor's

vision merely furthers the policy that future growth in the amounts of such waste to be disposed of must be accompanied by growth in the development and use of safer and more environmentally sound methods of disposal. (See § 9 of the Act 90-326).

(2) *The Supremacy Clause Challenge*

CWM alleges that the Cap provision comes into conflict with three federal statutes: the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C.A. §§ 6901 *et seq.*, which governs treatment and disposal of solid waste, the Toxic Substances Control Act ("TSCA"), 15 U.S.C.A. §§ 2602 *et seq.*, which regulates the disposal of toxic wastes such as PCBs, and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C.A. §§ 9601 *et seq.*, which provides federal funding for cleanup of hazardous and toxic substances. CWM's Emelle facility operates under permits issued in accordance with these federal statutes, and CWM argues that the Cap provision directly conflicts with either the provisions or the goals of all three. The Court disagrees, and will treat each statute in turn.

(a) *The Cap Provision Does Not Conflict With, Frustrate, or Impede the Operation of RCRA.*

RCRA, as amended in 1983, is a "cradle-to-grave" regulatory program which sets standards for the generation, treatment, storage, and disposal of hazardous waste. RCRA is designed to promote several goals with regard to hazardous waste: 1) assuring that hazardous waste

designee may allow disposal of hazardous wastes or hazardous substances in excess of the tonnage disposed of during the benchmark period if such action is determined by the Governor or the Governor's designee to be necessary to protect human health or the environment in the state, or to allow the state to comply with its obligations to assure disposal capacity pursuant to applicable state or federal law as determined by the Governor or his designee." Act 90-326, § 9.

management is conducted in a way that protects human health and the environment; 2) requiring that hazardous waste be properly managed from the outset; and 3) minimizing the generation of hazardous waste and the land-filling of hazardous waste by encouraging process substitution, materials recovery, recycling, and treatment. 42 U.S.C.A. § 6902(1), (4)-(6). The statute implements a national policy of minimizing the generation of hazardous waste and safely treating waste that has already been generated. 42 U.S.C.A. § 6902(b).

RCRA demonstrates a strong policy against landfilling. In the congressional findings accompanying the 1983 amendments, Congress found that "reliance on land disposal should be minimized or eliminated, and land disposal, particularly landfill and surface impoundment, should be the least-favored method for managing hazardous wastes" 42 U.S.C.A. § 6901(b)(7). Congress also maintained that alternatives to land disposal "must be developed." *Id.* at § 6901(b)(8). The floor debates which preceded the passage of the amendments repeatedly emphasized concerns about the dangers of landfill disposal. Congresswoman Schneider stated that the bill required a "direct economic disincentive for the land disposal of hazardous waste," and advocated supplementing the measure with "economic incentives that encourage alternatives to land disposal." 29 CONG. REC. pt 17 (1983), p. 23164. Congressman Walgren argued,

In my view, our society should seriously question the continued land disposal of hazardous wastes. If we can find ways to dispose or neutralize hazardous waste instead of dumping it in the ground, we should. Ground disposal is inherently dangerous because subsequent contamination of liners in landfills can be penetrated with underground water. There are other ways to dispose of wastes that we should turn to.

Id. at p. 23163. Congressman Frenzel similarly stated, "continued reliance on land disposal of hazardous wastes

is a dangerous policy which threatens the health of Americans now and in the future." *Id.* at p. 23161.

In light of these concerns, this Court finds that the Cap provision is consistent with what Congress had in mind when passing RCRA—reducing the amount of land-filled waste—and furthers, rather than frustrates the purpose of RCRA. The Cap provision is a mechanism which will encourage generators to find ways other than landfilling to dispose of their hazardous wastes, and this is exactly what Congress emphasized in RCRA.

Further, RCRA directly addresses the question of federal/state supremacy. Section 6929 states that no state may impose treatment and disposal requirements less stringent than those prescribed in RCRA, and further states, "Nothing in this chapter shall be construed to prohibit any state . . . from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations." RCRA sets a floor, a minimum level of regulation by which all states must abide. State actions or regulations which go above that floor—which are more stringent than RCRA—are expressly permitted. The Cap provision, being more stringent than the requirements of RCRA, is clearly permissible. In short, there is no indication that the Cap provision conflicts with or impedes the operation of RCRA in any way.

(b) *The Cap Provision Does Not Conflict With, Frustrate, or Impede the Operation of TSCA.*

TSCA regulates the handling of toxic chemical substances and mixtures in an attempt to promote the promulgation of adequate data concerning the risks involved with such substances. In particular, Congress wishes through TSCA to encourage technological innovation, while at the same time ensuring that such innovation did not "present an unreasonable risk of injury to health or the environment." 15 U.S.C.A. § 2601(b)(3).

Again, in light of this policy, the Court finds that the Cap provision, one effect of which will be to encourage the development of alternative disposal technologies while minimizing the amount of waste landfilled, does not "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting TSCA," as CWM claims. In light of express congressional policy discouraging and disfavoring the practice of burying such highly dangerous materials in the ground, the Court cannot conceive that Congress, in enacting TSCA, intended to grant landfill operators a right to bury unlimited amounts of such materials. Nor does the Court find that such unlimited burial is necessary to the implementation of that Act.

(c) *The Cap Provision Does not Conflict With, Frustrate, or Impede the Operation of CERCLA.*

"[T]he primary purpose of CERCLA is the prompt cleanup of hazardous waste sites." *State of Alabama v. United States Environmental Protection Agency*, 871 F.2d at 1557-58 (quoting *Dickerson v. Administrator, EPA*, 834 F.2d 974, 978 (11th Cir. 1987)). CERCLA allows the Administrator to promulgate regulations involving substances which, when released, could cause harm to the environment. 42 U.S.C.A. § 9602(a). It requires anyone who has knowledge of the release of such a substance greater than a designated amount to notify the United States government. 42 U.S.C.A. § 9603. Whenever such a release occurs, CERCLA authorizes the President to remove the substance and/or provide for remedial action, or to take any other response "consistent with the national contingency plan." 42 U.S.C.A. § 9604(a). Along with 26 U.S.C.A. § 9507, CERCLA establishes a trust fund, commonly known as "Superfund," to be used to pay costs incurred by the government in providing this help. 42 U.S.C.A. § 9611.

CWM argues that the Fee Act's Cap provision artificially requires the Emelle facility to withhold capacity

that otherwise would be available immediately for the disposal of waste generated at Superfund cleanup sites located outside of the State of Alabama, and that the provision "undermines Congress' goal of making the best use of existing waste treatment and disposal facilities in the short term." CWM's argument is based on the assumption that Alabama has the burden under CERCLA of meeting the capacity assurance requirements of other states. This Court does not agree. CERCLA places the capacity assurance burden on the state *generating* the waste, not on the state importing it. Alabama is not required to provide enough capacity to dispose of all of the waste generated in the United States during the next twenty years; it has to assure the President only that it can provide capacity to dispose of *its own* waste during that period.

Again, CWM is arguing that a statute designed to protect and promote health, safety and environmental quality indirectly evidences a congressional policy which directly conflicts with the *express* congressional policy against landfilling. CWM would have the Court construe CERCLA as being inconsistent with the policy clearly stated in another congressional enactment addressing the same general environmental quality concerns. This Court cannot find that Congress, in providing for clean-up of the results of past unsound waste disposal practices, intended to imply a policy conflicting with its expressly stated condemnation of reliance on landfilling.

(3) *The Due Process Challenge*

Economic and social legislation, such as that involved herein, falls under the substantive component of the Due Process Clause, and the standard for evaluating its validity is virtually identical to the Equal Protection "rational relationship" test. *In re Wood*, 866 F.2d 1367, 1371 (11th Cir. 1989).

[Economic and social legislation] generally will be upheld against a substantive due process attack unless the legislation "manifests a patently arbitrary classification, utterly lacking in rational justification." *Fleming v. Nestor*, 363 U.S. 603, 611 . . . (1960). As with the "rational relationship" test, *any* plausible reason supporting Congress' action in enacting the suspect legislation satisfies the "rational basis" test. *Id.* at 612, 80 S.Ct. at 1373.

Id. (emphasis in the original). This Court's analysis of CMW's Due Process challenge to the Cap provision, therefore, is very similar to its analysis of CWM's Equal Protection claims.

CWM contends that the Cap provision "arbitrarily and irrationally" deprives it of its property interest in the Emelle facility in violation of the Due Process Clause. However, where, as here, restrictions on waste disposal are related to the state's goal of preserving and managing landfill space and in protecting the health and safety of its citizens, such restrictions do not violate due process. *Bill Kettlewell Excavating, Inc. v. Michigan Dept. of Natural Resources*, 732 F.Supp. 761, 765 (E.D. Mich. 1990). Moreover, the state's reasons for treating hazardous waste buried in commercial facilities differently from industrial waste buried on site are rational and are not arbitrary. The Cap provision is rationally related to reducing the transportation and accumulation of hazardous waste and similar dangerous substances in the state. When such a rational basis for a statute exists, it does not violate the Due Process Clause.

(4) *The Contracts Clause Challenge*

Article I, section 10 of the federal Constitution makes it unlawful for states to impair the obligations of contracts. Although debtor relief laws were the primary focus of the Contracts Clause, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 502-503 (1987),

the Clause has since been applied to other kinds of laws, including state laws that have the incidental effect of altering contractual obligations. See *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). A state statute does not violate the Contracts Clause "simply because it has the effect of restricting, or even barring altogether, the performance of duties created by contracts entered into prior to its enactment." *Exxon Corp. v. Eagerton*, 462 U.S. at 190. Rather, a court analyzing a Contracts Clause claim must employ a balancing test.

First, the court must determine whether the state law has in fact substantially impaired the contractual relationship. *Spannaus*, 438 U.S. at 244.

The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

Id. at 245. Second, if the law does substantially impair the contractual rights, the state must show that the law was designed to promote a legitimate public purpose, such as remedying a general social or economic problem. *Energy Reserves Group v. Kansas Power and Light Co.*, 459 U.S. 400, 411-412 (1983). Finally, if the statute is shown to have a legitimate public purpose, the state must show that the law is based on reasonable conditions and that it is of a character appropriate to the public purpose. *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 445-47 (1934). In making this determination, courts defer to the legislative judgment if the regulation involved is social or economic. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22-23 (1977).

Applying the above analysis, the conclusion is clear that the Cap provision does not violate the Contracts

Clause. First, CWM has made no showing that the Cap provision has impaired its existing contracts. Second, even had CWM presented some proof that the Cap provision impaired its existing contracts, it is clear that the law was designed to promote a legitimate public purpose. Finally, as discussed above, the Cap provision is based on reasonable conditions: it allows CWM and the out-of-state generators to determine the cap amount. Moreover, it is of a character to promote the public purpose—it will prevent the amount of hazardous waste buried in the state from increasing in subsequent years. All three elements of the test balance in favor of the Cap provision.

(5) *The Takings Clause Challenge*

Under the Fifth Amendment to the United States Constitution, government is prohibited from taking private property for public use without just compensation. The question to be answered in determining whether the Takings Clause has been violated is whether the governmental action amounts to a "taking" requiring compensation. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). To make this determination, a court must determine 1) whether there is a property interest involved, see e.g., *Andrus v. Allard*, 44 U.S. 51, 65-66 (1979); and 2) whether that property interest has been diminished—in a case like the present one, whether there has been a diminution in the economic viability of the property by the state regulation, see *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. at 485-86, or whether state infringement of the private property right was done in the legitimate exercise of Police Power or to advance a legitimate state interest and whether the infringement operates to further that interest, see *Id.*; *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). If the result of this analysis indicates that there has in fact been a taking, the remedy is generally payment of

just compensation. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841-42 (1987).

The Cap provision has not effected a "taking" within the meaning of the Takings Clause. This Court has already established several times over the fact that the Cap provision—indeed, the Fee Act as a whole—advances legitimate state interests. It is equally clear that the Cap provision has not made it commercially impracticable for CWM to continue operating its Emelle facility. CWM still owns the Emelle facility in its entirety. Its use has not been changed or restricted; it is still a commercial hazardous waste disposal facility. Comparing, then, "the value that has been taken from the property with the value that remains in the property," *DeBenedictis*, 480 U.S. at 497, the Court concludes that even if some diminution in value has occurred, it by no means would constitute a taking requiring compensation under the Takings Clause.

C. *The Challenge Under § 70 of the Alabama Constitution*

The Court finds that enactment of the Fee Act did not violate Article IV, Section 70 of the Alabama Constitution. Article IV, section 70 of the Alabama Constitution provides:

All bills for raising revenue shall originate in the house of representatives. The governor, auditor, and attorney general shall, before each regular session of the legislature, prepare a general revenue bill to be submitted to the legislature, for its information, and the secretary of state shall have printed for the use of the legislature a sufficient number of copies of the bill so prepared, which the governor shall transmit to the house of representatives as soon as organized, to be used or dealt with as that house may elect. The senate may propose amendments to revenue bills. No revenue bill shall be passed during the last five days of the session.

CWM asserts that the Fee Act is a revenue bill which was enacted during the last five days of the legislative session, and that the enactment thus violated the last sentence of Article IV, section 70.

This Court finds that the Fee Act is not a "revenue bill" within the meaning of section 70. In *Woco Pep Co. of Montgomery v. Butler*, 142 So. 509 (Ala. 1932), the Alabama Supreme Court explained the meaning of the term "revenue bill" as it appears in the last sentence of section 70. The Constitution of 1875 contained only the first sentence of the present section 70. When the provision was rewritten for the Constitution of 1901, the last three sentences were added, defining a "general revenue bill" and explaining how such a bill was to be enacted. The Supreme Court considered the added sentences in conjunction with the remarks of the committee chairman who presented the revision to the Constitutional Convention, and came to the conclusion that the last sentence of section 70 "was intended by the Constitution makers to apply only to the general revenue bill." *Id.* at 511 (emphasis added). The Court held that the fact that the Constitution makers revised the penultimate sentence of section 70 to authorize the Senate to propose amendments to the general revenue bill and to amend specific bills for raising revenue only strengthened its conclusion that the term revenue bill "related exclusively to and affected general revenue bills." *Id.* See also *Opinion of the Justices*, 115 So. 2d 464, 467-68 (Ala. 1959); *Opinion of the Justices*, 115 So. 2d 484, 485 (Ala. 1959); *Opinion of the Justices*, 66 So. 2d 921, 923 (Ala. 1953); *Dorsky v. Brown*, 51 So. 2d 360, 362 (Ala.), cert. denied, 342 U.S. 818 (1951). Because the Fee Act is not a general revenue bill, but a specific measure, section 70 does not apply.

D. *THE \$72 ADDITIONAL FEE*

Although the Legislature imposed an additional fee of \$72.00 per ton on waste generated outside Alabama, there is absolutely no evidence before this Court that waste

generated outside Alabama is more dangerous than waste generated in Alabama. The Court finds under the facts of this case that the only basis for the additional fee is the origin of the waste.

The Commerce Clause of the United States Constitution bars the States from erecting barriers against interstate commerce. See, e.g., *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 373-374 (1964); *H. P. Hood & Sons v. Dumond*, 336 U.S. 525, 537-539 (1949). It is settled that the Commerce Clause prevents a State from discriminating, solely on the basis of origin, against waste generated in other States by subjecting such waste to more restrictive regulation than waste generated within the State. In *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), for example, the United States Supreme Court overturned a New Jersey statute barring the disposal within New Jersey of waste generated in other states. More recently, the United States Court of Appeals for the Eleventh Circuit struck down an Alabama law barring disposal within Alabama of hazardous waste generated in certain other States. *National Solid Wastes Management Ass'n v. Alabama Dep't of Environmental Management*, 910 F.2d 713 (1990) *panel rehearing denied*, — F.2d —, (Feb. 7, 1991) ("NSWMA"). Another court recently issued a preliminary injunction against enforcement of South Carolina statutes and regulations that restricted the disposal within that State of hazardous waste generated in other States. *Hazardous Waste Treatment Council v. State of South Carolina*, Civil Action No. 3:90-1402-O (D.S.C. Jan. 11, 1991).

In this opinion, this Court has recognized that serious problems associated with hazardous waste plague our nation. See *National Solid Waste Management*, 910 F.2d at 715-716. The Eleventh Circuit pointed out that however honorable and well intentioned Alabama's leaders might be in coming to grips with environmental problems, it is the duty of the courts to guard against uncon-

stitutional discrimination and interference with interstate commerce. See *id.* at 725. A higher fee based solely on origin is not constitutionally permissible. The settled law as set forth by both the Supreme Court in *City of Philadelphia* and by the Eleventh Circuit in *NSWMA* leaves this Court with no choice but to hold that the Additional Fee violates the Commerce Clause under the facts here presented.

First, the Additional Fee affects interstate commerce within the meaning of the Commerce Clause. The substances subject to the Additional Fee—non-hazardous waste and hazardous waste—have been held to be articles of commerce within the purview of the Commerce Clause. *City of Philadelphia*; *NSWMA*.

Second, the Additional Fee facially discriminates against waste generated in States other than Alabama ("out-of-state waste"). By its very terms, the fee applies *only* to out-of-state waste. Waste generated within Alabama ("in-state waste") is completely exempted from the Additional Fee. The Additional Fee therefore clearly and unequivocally discriminates against interstate commerce.⁵

Once a state law is found to discriminate on its face against interstate commerce, the law may be upheld only if the State carries the heavy burden of "showing that [the statute] advances a legitimate local purpose that

⁵ Defendants have suggested that the discriminatory character of the Additional Fee is less than that of the Alabama statute invalidated by the Eleventh Circuit because the latter statute discriminated among States other than Alabama, banning importation of waste from only certain States, while the Additional Fee discriminates against all States other than Alabama. However, the U.S. Supreme Court has made clear that the scope of a statute's discrimination against interstate commerce is legally irrelevant. *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 276 (1988). Certainly the fact that the Additional Fee discriminates against more States does not improve its status under the Commerce Clause.

cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278 (1988). "[T]he standards for such justification are high." *Id.*; see also *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (a reviewing court must engage in "the strictest scrutiny of any purported legitimate local purpose and of the absence of discriminatory motives"). Indeed, courts routinely reject attempts to justify statutes that discriminate against interstate commerce and instead hold such statutes invalid under the Commerce Clause. See, e.g., *New Energy Co.*, *supra*; *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. (1984); *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Hughes*, *supra*; *City of Philadelphia*, *supra*; *Boston Stock Exchange v. State Tax Comm'r*, 529 U.S. 318 (1977); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951); *NSWMA*, *supra*.

This Court has carefully reviewed the entire record in this case, including the legislative findings contained in Act No. 90-326. This Court finds that hazardous waste generated in Alabama is just as dangerous as such waste generated in other states. All of the safety and environmental concerns set forth at trial and as contained in the findings of fact of this Court apply with equal force to hazardous waste generated in and out of the State of Alabama. Moreover, the Act in question contains no distinction as to the type of hazardous waste, the degree of dangerousness, or as to what type of hazard minimization procedures to which the waste may or may not have been subjected in other states. This Court finds that the record contains no evidence of any difference between in-state waste and out-of-state waste other than the waste's state of origin.

Defendants also argue that Alabama has a legitimate interest in forcing other States to assume responsibility for handling disposal of waste generated in those States. That argument also was rejected by the Eleventh Circuit in the *NSWMA* case. 910 F.2d at 720-721. Furthermore, the U.S. Supreme Court has held that "a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." *City of Philadelphia*, 437 U.S. at 627.

Finally, defendants assert that the Additional Fee is justified because it is part of Alabama's waste minimization program. The Court finds that the Additional Fee is not an evenhanded waste minimization effort; rather, the Legislature imposed a discriminatory burden on out-of-state waste. Based on the record before it, the Court further finds that the mandatory \$72 per ton Additional Fee is not equivalent to the waste minimization program for in-state generators, which consists of seminars and engineering advice available to in-state generators on a voluntary basis. For example, the Additional Fee applies to waste generated in States that have minimization programs for in-state generators that are comparable to Alabama's program for in-state generators. The Additional Fee also applies to waste that cannot be minimized because it results from the cleanup of old unsafe disposal sites. Moreover, the Additional Fee imposes a considerable monetary cost on out-of-state generators that is significantly more burdensome than Alabama's voluntary incentive program for in-state generators.

The Court further finds that there are reasonable non-discriminatory means by which Alabama could further the goal of waste minimization. In particular, the State could impose a mandatory fee that falls even-handedly on both in-state waste and out-of-state waste or it could adopt the same voluntary program for both. The base fee could be increased to cover all waste, both in-state and out-of-state. As hereafter noted, the State could constitu-

tionally charge a higher fee based on the degree of dangerousness, the nature of the waste or the lack of hazard minimization measures. What the Commerce Clause forbids is a significantly heavier burden that is imposed by the Additional Fee based on the origin of the waste.⁶ The Additional Fee therefore is invalid under the Commerce Clause.⁷

The Court concludes that the remainder of Plaintiff's challenges to the Act are without merit.

In deciding this case this Court has been mindful of the principals enunciated by the Supreme Court of Alabama in *White v. Reynolds Metals Co.*, 558 So.2d 373 (Ala. 1989). The Court has applied the principles of *White* to the facts now before this Court. Specifically, this Court recognizes that it is "the duty of the Court to

⁶ Defendants also tried to justify the Additional Fee on the ground that it makes out-of-state generators pay their fair share of the costs of Alabama waste disposal facilities. The Court finds that defendants failed to adduce any evidence that (1) in-state generators bore a disproportionate share of these costs prior to the enactment of the Additional Fee other than the legislative findings with regard to the volume of out-of-state hazardous waste, or (2) the \$72 fee equalizes the burden on in-state and out-of-state generators. Even if defendants had presented such evidence, the U.S. Supreme Court's decision in *American Trucking Ass'ns. Inc. v. Scheiner*, 483 U.S. 266, 287-289 (1987), would require rejection of their argument. The Court further finds that defendants failed to justify the Additional Fee as a "compensatory tax" because they have not identified a "substantially equivalent" tax imposed solely on in-state waste. *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 244 (1987); *Armco Inc. v. Hardesty*, 467 U.S. 638, 643 (1984); *Maryland v. Louisiana*, 451 U.S. 725, 759 (1981).

⁷ As noted above, the Eleventh Circuit's decision in *NSWMA* indicates that the State might be able to set different tax levels for different types of waste on the basis of, for example, the degree of dangerousness of the waste. The legislature could choose to not tax non-hazardous waste at Emelle, and tax less dangerous or treated waste at a lower rate than more dangerous waste. The particulars of any such tax law would, of course, have to be analyzed under the applicable constitutional standard.

sustain the Act unless it is clear beyond a reasonable doubt that it is violative of the fundamental law." *Id.* at 383. The additional fee provision of Act 90-326 obviously treats hazardous waste generated outside of Alabama differently from hazardous waste generated in the State of Alabama. The evidence here fails to show any distinction whatsoever in the degree of dangerousness between in-state and out-of-state hazardous waste. The only basis for the difference in treatment is origin. This distinction has been repeatedly held constitutionally impermissible.⁸

V. RELIEF

This Court has upheld the legality of the Base Fee and the Cap provisions of Act 90-326. The Court has further held the Additional Fee provision of the Act to be violative of the Commerce Clause of the Constitution. Section 10 of the Act contains a severability clause. Therefore, the Additional Fee levied in Section 3(b) of the Act may be severed from the Act and this severance shall not affect the remaining portions of the Act.

The Court must now address the appropriate relief available to the Plaintiffs for the payment of fees pursuant to the \$72 Additional Fee provision. The Plaintiffs in seeking injunctive and declaratory relief have not specifically requested relief in the form of a refund for fees paid pursuant to the challenged provisions. This Court however has previously noted that the remedies available to the Plaintiffs, should they prevail, would include the statutory provisions of the Fee Act itself, Sec-

⁸ In addition, the Supreme Court in *White* found that the provisions of the Alabama Constitution presented the legislature with a "difficult problem of imposing franchise tax, because Section 229 and Section 232 prescribe different methods of imposing the tax." The Court also noted in *White* that . . . "Alabama tax laws that in some cases favored domestic incorporation and in others favor doing business here as foreign corporations cannot be said to violate the Commerce Clause." These are clear differences in the facts before the Court in *White* as compared with those now before this Court.

tion 22-30B-13, *Code of Alabama*, and other general provisions of law, including Section 40-1-34 and section 40-2-22, *Code of Alabama*. (See orders of July 13, 1990 and August 30, 1990). As discussed below, a refund is one alternative form of relief from the unconstitutional provision.

If a state requires a taxpayer to pay a tax prior to obtaining a determination of its validity, the Due Process Clause of the 14th Amendment to the United States Constitution requires that a post-payment remedy be provided. *McKesson Corporation v. Florida Alcohol and Tobacco Division*, — U.S. —, 110 S.Ct. —, 110 L.Ed. 2d 17 (1990). *McKesson* makes it clear, however, that a refund is not necessarily the required form of relief. In the case of a tax which impermissibly discriminates against interstate commerce, it is a remedy for the *discrimination* which is required, not relief from the tax.

Under *McKesson* the past discrimination may be cured either by a refund, by a retroactive increase in the lower discriminatory tax rate, or by a combination of a partial refund and a partial retroactive increase. *Id.*, 110 L.Ed. 2d at 38-39. What is required is that the resultant tax actually assessed during the period does not, in hindsight, discriminate against interstate commerce. *Id.* The State retains flexibility in responding to a determination that a tax is impermissibly discriminatory, and may reformulate and enforce the tax retroactively during the contested period in any manner consistent with the requirements of the Commerce Clause. *Id.* at 38. "Having done so, the State may retain the tax appropriately levied upon [the taxpayer] pursuant to this reformulated scheme because this retention would deprive [that taxpayer] of its property pursuant to a tax scheme that is valid under the Commerce Clause." *Id.* The State is free to choose the form of relief, so long as that relief satisfies the requirements outlined in *McKesson*. *Id.* at 45.

It is important to note that it is the *discrimination* which is invalid—not the higher rate, nor the lower rate, but the *difference*. It is this difference which must be corrected retroactively, either by refund of amounts paid under the higher rate, retroactive assessment of the higher rate across the board, or something in between.

McKesson holds that *the State* must remedy the discrimination, and that *the State* is free to choose the form of relief. It does not say that *the state court* must choose the form of remedy in the first instance. It is the opinion of this Court that the legislature of the State of Alabama should have an opportunity to correct the portion of Act 90-326 which the Court finds to be constitutionally impermissible. The Court finds that choosing an appropriate and constitutional remedy should, in the first instance, be left to the legislature. Under separation of powers principles, the levying of taxes and fees, as well as the formulation of public policy regarding health, safety and the environment, is a function of the legislature. The enforcement of public policy and the collection of taxes and fees, as established by the legislature, is a function of the executive branch. Therefore, this Court is of the opinion that these branches have the responsibility to determine and should have the opportunity to determine which alternative form of correction of the discrimination is to be implemented to further the public policy as established by the legislature. Of course, if the discrimination is not remedied in accordance with the requirements of *McKesson*, it becomes the duty of the Court to provide relief. Under § 6-6-230, *Code of Alabama* (1975), this Court retains jurisdiction to grant relief whenever necessary or proper.

This Court permanently enjoins Defendants from collection of the Additional Fee, but such injunction shall be stayed until adjournment of the next regular session of the legislature, which begins on April 16, 1991. The Court finds that immediate injunction is unnecessary and

inappropriate. Ultimate relief is guaranteed by *McKesson*, and this Court retains jurisdiction to ensure that such relief will be provided. Under *McKesson*, the State may remedy the discrimination by creating, retroactively, a non-discriminatory fee at a level which would result in the same total amount of fees and perhaps an even greater amount being due. If this is what the legislature chooses to do, an injunction at this point would constitute unwarranted interference with the proper collection of legally assessed fees.

The legislature, by the \$72.00 Additional Fee, attempted to create an economic disincentive to discourage landfilling of the waste involved in this case. The Additional Fee, however, was based entirely on the origin of the waste and is constitutionally impermissible. The legislature could choose to further its policies by distinguishing among wastes based on the type of waste and the degree of dangerousness of various types of wastes or upon utilization or lack of utilization of hazard minimization measures rather than solely on the basis of state of origin. This Court will not presume which form of remedy might be chosen. Pending legislative action, the Court will stay its injunction against collection temporarily, while retaining jurisdiction to provide relief if the State fails to correct the unconstitutional nature of the fee structure.

This Court has upheld the constitutionality of the Cap provisions of the Act. However, the benchmark period to establish the cap on volumes disposed of in future years began simultaneously with the effective date of the Additional Fee. In seeking a preliminary injunction at an early stage of these proceedings, Plaintiff argued that, to the extent that its volume of business would be reduced by passing on the Additional Fee as an increase in charges to its customers, the effects of the Additional Fee would be perpetuated in the form of a reduced volume limitation.

Whether the results of an unconstitutionally discriminatory fee will be perpetuated, and therefore require relief, will depend on the form of the remedy ultimately implemented to correct the discriminatory fees. If, in hindsight, Plaintiff's costs or charges were in fact increased by invalid fees during the period, volume may have been reduced as a result. If the legislature chooses to retroactively impose non-discriminatory fees by extending the Additional Fee to in-state waste received during the period, however, the discrimination may well have been cured.

Because the determination of whether the volume cap is influenced by unconstitutionally discriminatory fees depends on the form of correction of the discrimination, it cannot be determined at this time whether Plaintiff has been damaged in this regard by the discriminatory fees. However, if the remedy implemented involves payment of a refund, in whole or in part, then the Plaintiff's payments during the benchmark period will have been increased by an unconstitutional fee. In that event some form of relief, which may include establishment of a new benchmark period or an injunction against enforcement of a cap which perpetuates the effects of discriminatory fees, will be necessary. This depends on the action taken by the legislature and will be addressed by the Court if the remedy chosen by the legislature makes such relief necessary or if the legislature does not choose to enact any remedial legislation. The volume cap for future years may not be based on a benchmark period which includes any time during which an unconstitutionally discriminatory fee was assessed. This Court retains jurisdiction and will entertain an appropriate motion by Plaintiff seeking such relief as may be necessary to remedy the discrimination in the event the State does not do so, including relief from the effect of discriminatory fees on the volume cap.

This retention of jurisdiction to implement further relief does not affect the finality of the Court's Order declaring the Additional Fee provision of the Act to be invalid under the Commerce Clause and declaring the validity of the Base Fee and Cap provisions. This determination decides the material issues of fact and law involved, determines the legal rights of the parties and the principles by which such rights are to be worked out, and is therefore intended to be an appealable final order in that regard. See *Miles v. Bank of Heflin*, 328 So.2d 281, 285 (Ala. 1975); *McCulloch v. Roberts*, 276 So.2d 425, 427 (Ala. 1973).

An Order and Injunction will be entered this date in accordance with the foregoing Findings of Fact and Conclusions of Law.

Done this the 28th day of February, 1991.

/s/ Joseph D. Phelps
JOSEPH D. PHELPS
Circuit Judge

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

Civil Action No. CV-90-1098-PH

CHEMICAL WASTE MANAGEMENT, INC., PLAINTIFF

vs.

THE ALABAMA DEPARTMENT OF REVENUE; JAMES M. SIZEMORE, JR., as Commissioner of the ALABAMA DEPARTMENT OF REVENUE; and GUY HUNT, as Governor of Alabama, DEFENDANTS

ORDER AND INJUNCTION

This Court today, by entry of its Findings of Fact and Conclusions of Law, incorporated herein by reference, has declared the "Base Fee" and "Cap" provisions of Act 90-326 to be valid and constitutional, and has declared the \$72.00 per ton "Additional Fee" imposed on out-of-state hazardous waste by Act 90-326 to be impermissible and invalid under the Commerce Clause of the United States Constitution.

The holding of the U. S. Supreme Court in *McKesson Corp. v. Florida Alcohol and Tobacco Division*, — U.S. —, 110 S. Ct. 2238, 110 L.Ed. 2d 17 (1990) requires and guarantees a retroactive remedy of the discriminatory effect of the Additional Fee on interstate commerce. This Court has found that the Alabama Legislature should have the opportunity to correct the unconstitutional discrimination against interstate commerce in accordance with the alternatives available to the State under *McKesson*. Because the guarantee of relief under *McKesson* makes immediate injunctive relief unnecessary and because the alternatives available to the Legislature make such injunctive relief unwarranted and undesirable, the Court will stay its injunction against enforcement

until the Legislature has had the opportunity to correct the constitutionally impermissible fee structure.

Therefore, it is hereby ORDERED, ADJUDGED and DECREED that the Additional Fee is invalid and unconstitutional; that the Base Fee and Cap provision are valid and constitutional; and that Act No. 90-326 was not enacted in violation of § 70 of the Alabama Constitution. Judgment is entered in favor of Plaintiff on Count I of the complaint, and judgment is entered in favor of the Defendants on the remaining Counts. Judgment is also entered in favor of Plaintiff on Defendant Hunt's counterclaim to the extent it seeks a declaration of the Additional Fee's validity, and in favor of Defendant Hunt in all other respects.

It is further ORDERED, ADJUDGED and DECREED that Defendants are permanently enjoined from collecting the \$72.00 per ton "Additional Fee" imposed on out-of-state waste by Act 90-326.

It is further ORDERED, ADJUDGED and DECREED that this injunction shall be stayed until and shall become effective upon the adjournment of the 1991 Regular Session of the Alabama Legislature.

Each party will bear its own costs.

DONE this the 28th day of February, 1991.

/s/ Joseph D. Phelps
JOSEPH D. PHELPS
Circuit Judge

APPENDIX C

THE STATE OF ALABAMA JUDICIAL DEPARTMENT IN THE SUPREME COURT OF ALABAMA

July 11, 1991

Montgomery Circuit Court
CV-90-1098

1901043

GUY HUNT, as Governor of the State of Alabama

v.

CHEMICAL WASTE MANAGEMENT, INC.

CERTIFICATE OF JUDGMENT

Affirmed in Part, Reversed in Part

The appeal in this cause having been duly submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the circuit court is affirmed in part, reversed in part, and the cause is remanded to the circuit court for further proceedings consistent with the opinion this day delivered in this cause by this Court.

IT IS FURTHER ORDERED that the costs of appeal be taxed one-half to appellant(s) and one-half to appellee(s).

OPINION BY SHORES, J.

Hornsby, CJ., Maddox, Almon, Adams, Steagall and Ingram, JJ., concur; Houston, J., concurs in the judgment.

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

July 11, 1991

Montgomery Circuit Court
CV-90-1098

1901044

JAMES M. SIZEMORE, JR., as Commissioner of the
Alabama Department of Revenue, and the
ALABAMA DEPARTMENT OF REVENUE

v.

CHEMICAL WASTE MANAGEMENT, INC.

CERTIFICATE OF JUDGMENT

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IT IS FURTHER ORDERED that the costs of appeal be taxed one-half to appellant(s) and one-half to appellee(s).

100a

OPINION BY SHORES, J.

Hornsby, CJ., Maddox, Almon, Adams, Steagall and Ingram, JJ., concur; Houston, J., concurs in the judgment.

101a

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

July 11, 1991

Montgomery Circuit Court
CV-90-1098

1901106

CHEMICAL WASTE MANAGEMENT, INC.

v.

THE ALABAMA DEPARTMENT OF REVENUE, *et al.*

CERTIFICATE OF JUDGMENT

Affirmed in Part, Reversed in Part

The appeal in this cause having been duly submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the circuit court is affirmed in part, reversed in part, and the cause is remanded to the circuit court for further proceedings consistent with the opinion this day delivered in this cause by this Court.

IT IS FURTHER ORDERED that the costs of appeal be taxed one-half to appellant(s) and one-half to appellee(s).

OPINION BY SHORES, J.

Hornsby, CJ., Maddox, Almon, Adams, Steagall and Ingram, JJ., concur; Houston, J., concurs in the judgment.

APPENDIX D

Reps. Holley, Turner, Fuller, Hammett, Newton (C)

H. 310

Enrolled, An Act,

This bill amends Sections 22-30B-1, 22-30B-2, 22-30B-3, 22-30B-11, and 22-30B-15, Code of Alabama 1975, which relates to fees for disposal of hazardous waste and hazardous substances, so as to provide for certain definitions; to impose additional fees and to provide for distribution thereof; to provide for certain exemptions; to provide for certain restrictions on disposal; to provide a cap on the amount of hazardous waste and hazardous substances disposed of during any twelve-month period beginning October 1, 1991, said cap being a function of the amount of hazardous waste and hazardous substances disposed of during the twelve-month period beginning July 15, 1990, and ending July 14, 1991, and the purpose of said cap being the prevention of an artificial decrease in fees during the twelve-month period beginning July 15, 1990, and ending July 14, 1991.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. Section 22-30B-1 of the Code of Alabama 1975 is hereby amended by inserting the following new section and renumbering all existing sections accordingly.

Section 22-30B-1. Legislative Findings. The legislature finds that:

(a) The state is increasingly becoming the nation's final burial ground for the disposal of hazardous wastes and materials;

(b) The volumes of hazardous wastes and substances disposed in the state have increased dramatically for the past several years;

(c) The existence of hazardous waste disposal activities in the state poses unique and continuing problems for the state;

(d) As the site for the ultimate burial of hazardous wastes and substances, the state incurs a permanent risk to the health of its people and the maintenance of its natural resources that is avoided by other states which ship their wastes to Alabama for disposal;

(e) The state also incurs other substantial costs related to hazardous waste management including the costs of regulation of transportation, spill cleanup and disposal of ever-increasing volumes of hazardous wastes and substances;

(f) Because all waste and substances disposed at commercial sites for the disposal of hazardous waste and hazardous substances, whether or not such waste and substances are herein defined as hazardous, contribute to the continuing problems created for the state, and because state and federal definitions of "hazardous wastes" have regularly changed and are likely to change in the future to include waste not previously defined as hazardous, it is necessary that all waste and substances disposed of at a commercial site for the disposal of hazardous waste or hazardous substances be included within the requirements of this act;

(g) The legislature finds that the public policy of the state is to encourage business and industry to develop technology that will eliminate the generation of hazardous waste and substances. The legislature finds that substantial progress has been made in the implementation of hazardous waste disposal programs in the secondary lead recovery industry and that such technology will be generally available by October 1, 1992. Therefore, the intent of the legislature is that fees assessed herein against the operators of commercial sites for the disposal of hazardous waste or hazardous substances not be ap-

plied until after October 1, 1992, to waste disposed of at such sites by secondary lead smelters to the extent that said fee exceeds the fees in effect on the date of passage of this Act.

(h) Since hazardous wastes and substances generated in the state compose a small proportion of those materials disposed of at commercial disposal sites located in the state, present circumstances result in the state's citizens paying a disproportionate share of the costs of regulation of hazardous waste transportation, spill cleanup and commercial disposal facilities. Persons, firms or corporations which generate and dispose of such waste and substances in Alabama presently are among the taxpaying citizens of this state who must bear the burden of the regulation, inspection, control and clean-up of hazardous waste sites; addressing the public health problems created by the presence of such facilities in the state; and, preserving this state's environment while those generating this waste in other states and shipping it to Alabama for disposal presently are not. This act attempts to resolve that inequity by requiring all generators of waste being disposed of in Alabama to share in that financial burden.

(i) The operators of commercial sites for the disposal of hazardous wastes or hazardous substances have the ability to control the flow of said wastes or substances into said sites. Further, said operators, by exercise of said ability to control the flow of wastes or substances disposed at sites during a twelve-month period, only to enlarge the amount of wastes disposed during the next twelve-month period by a proportionate amount. The health of the population of this state and the soundness of the environment of this state are and would be threatened by such an exercise of control. Said exercise of control could cause an artificial decrease in fees during the twelve-month period beginning July 15, 1990, and ending July 14, 1991. To prevent threats to the health of the

population of this state and to the soundness of the environment of this state and to prevent an artificial decrease in fees during the twelve-month period beginning July 15, 1990, and ending July 14, 1991, this act provides a cap on the amount of hazardous waste and hazardous substances disposed during the twelve-month period beginning October 1, 1991, said cap being a function of the amount of hazardous waste and hazardous substances disposed during the twelve-month period beginning July 15, 1990, and ending July 14, 1991.

Section 2. Section 22-30B-1 is amended as follows:

Section 22-30B-12. When used in this act and except where the context prohibits, the following words and terms shall have the following meanings:

(1) **COMMERCIAL SITE FOR THE DISPOSAL OF HAZARDOUS WASTE OR HAZARDOUS SUBSTANCES.** A site or facility receiving hazardous waste or hazardous substances, as defined herein, not generated on site, for disposal and to which a fee is paid or other consideration given for such disposal.

(2) **DISPOSAL.** The discharge, deposit, injection, dumping, spilling, incineration, leaking or placing of any waste or substance into or on any land or water so that such waste or substance or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters including groundwaters at a commercial site within the State of Alabama for the disposal of hazardous waste or hazardous substances as defined herein. For the purpose of this act incineration does not include hazardous substances or waste that have been blended for use as a fuel in conformance with state and federal requirements.

(3) **HAZARDOUS SUBSTANCE(S).** Any substance defined as a hazardous substance pursuant to 42 U.S.C. § 9601(14), as amended, or listed as a hazardous waste pursuant to the Code of Alabama 1975, Section 22-30-10, as amended.

(4) HAZARDOUS WASTE(S). Those wastes defined at Section 22-30-3(5), Code of Alabama 1975, as amended, or listed pursuant to Section 22-30-10, Code of Alabama 1975, as amended, or department regulations.

(5) OPERATOR. Any person, firm, or corporation owning or operating such facility or site.

(6) TON. A short ton of 2,000 pounds.

Section 3. Section 22-30B-2 is amended as follows:

Section 22-30B-23.

(a) In addition to other fees levied, there is hereby levied a fee to be paid by the operators of each commercial site for the disposal of hazardous waste or hazardous substances in the amount of 25.60 per ton for all waste or substances disposed of at such site.

(b) For waste and substances which are generated outside of Alabama and disposed of at a commercial site for the disposal of hazardous waste or hazardous substances in Alabama, an additional fee shall be levied at the rate of 72.00 per ton.

(c) In addition to the fees levied hereinabove, there is hereby levied a total of 9.00 per ton to be paid by the operators of each such commercial site for the disposal of hazardous wastes or hazardous substances in accordance with the following:

(1) Eight Dollars per ton effective October 1, 1989, \$7.00 of which shall be deposited in the General Fund of the State to be used for general operations; and \$1.00 of which shall be deposited to the credit of the general fund of the county wherein such commercial hazardous waste disposal site is located, and all such proceeds shall be expended for such purposes as may be appropriated by local act.

(2) Fifty cents per ton effective October 1, 1990, shall be deposited to the credit of the general fund of the

county wherein such commercial hazardous waste disposal site is located, and all such proceeds shall be expended for such purposes as may be appropriated by local act;

(3) Fifty cents per ton effective October 1, 1991, shall be deposited to credit of the general fund of the county wherein such commercial hazardous waste disposal site is located, and all such proceeds shall be expended for such purposes as may be appropriated by local act.

(d) Fees assessed herein against the operators of commercial sites for the disposal of hazardous waste or hazardous substances shall not be applied until after October 1, 1992, to waste disposed of at such sites by secondary lead smelters to the extent that said fees exceed the fees in effect on the date of passage of this amendatory act; provided, however, that any business or industry which is exempt from the payment of any fees or taxes levied by this Act that fails to develop and implement the technology to eliminate the generation of hazardous wastes and substances by October 1, 1992, shall pay to the General Fund of the State of Alabama an amount equal to the additional fees and taxes levied by the provisions of this Act that would have been due and payable at that time by the provisions of this Act. Provided, further, that in order for any taxpayer to qualify for such exemption, a petition on a form provided by the Department of Revenue must be submitted to the Department of Revenue within thirty (30) days of the effective date of this Act. Said petition shall provide that the exempted taxpayer acknowledge awareness of the provisions of this Act.

Section 4. Section 22-30B-3, Code of Alabama 1975, is hereby amended to read as follows:

Section 22-30B-34. The proceeds from the fee herein levied, less the department of revenue's actual cost for administration and collection, not to exceed 10 percent,

shall be deposited into the general budgetary fund of the state to be used for general operations unless provided otherwise in this chapter.

Section 5. Section 22-30B-11 is amended as follows:

Section 22-30B-112. Any operator of a commercial site for the disposal of hazardous waste or hazardous substances shall maintain written records of all such waste or substances received for disposal at the site and all waste or substances disposed of at the site. Said records shall contain the names and addresses of all persons, firms or corporations transporting and delivering such waste or substances to said facility, and the names and locations of all persons, firms or corporations from whence said waste or substance was produced or generated, the quantity of waste or substance received by such commercial hazardous waste or hazardous substance facility, and the date of delivery and such additional information as the commissioner of revenue or director of the department of environmental management reasonably may require for the proper administration and enforcement of the provisions of this act. This record must be a true, accurate and correct statement of the transaction as provided for under the provisions for this act, and any personnel or persons who knowingly make a false or fraudulent statement of a material fact with intent to defraud shall be guilty of a Class C misdemeanor and shall be punished as provided by law. The records required, under the provisions of this act, shall be maintained by the operators of said commercial site for the disposal of hazardous waste or hazardous substances, shall be available, during regular business hours, to any duly authorized agent or employee of the state of Alabama department of revenue or the Alabama department of environmental management, and such records shall be retained by said operators for a period of not less than three years. Any required records for such commercial site for the disposal of hazardous waste or hazardous

substances shall be retained by said operators for a period of not less than three years. Any operator of such commercial site for the disposal of hazardous waste or hazardous substances which shall fail to maintain such records, or in any manner shall cause the falsification of same as to any material matter with an intent to defraud, shall be guilty of a Class C misdemeanor and shall be punished as provided by law.

Section 6. Section 22-30B-15 of the Code of Alabama 1975 is hereby amended as follows:

Section 22-30B-156.

(a) It shall be unlawful for any person to print or publish in any manner whatever the fee report of any operator or any part thereof of the fees due thereon or to divulge to any person, except persons required or authorized to collect or audit or assist in collecting or auditing the reports or to use the information contained in any such report or acquired in auditing any such report or enforcing the provisions of this chapter for any purpose except for the audit of such report and collection of the fee imposed by this chapter, unless the fee thereby imposed becomes delinquent; any person violating the provisions of this section shall be deemed guilty of a misdemeanor and shall be fined not to exceed \$500.00 or sentenced to hard labor for the county for not more than 90 days, one or both for each offense, and upon conviction thereof any such person shall thereafter be ineligible to hold the office of commissioner or become or be an employee or agent of the department of revenue or under the department of revenue; provided, that the provisions of this section shall not apply to exchanges of information between the Alabama department of revenue and the Alabama department of environmental management when used for the purpose of administering the provisions of this chapter.

(b) Any assistant or agent of the department of revenue who shall willfully refuse to perform the duties im-

posed upon him by this chapter or by the department of revenue shall be deemed guilty of a misdemeanor and shall be fined not exceeding \$500.00 or sentenced to hard labor for the county for not more than 90 days, one or both, for each offense.

(c) All reports and information secured by officials or employees of the department of revenue for the purpose of arriving at fees shall be kept under lock and key by the department of revenue, and any official or employee of the state or of any county who shall divulge the contents thereof except under order of court shall be guilty of a Class C misdemeanor and shall be punishable as provided by law, and any person found guilty of violating this provisions of this chapter shall thereafter be ineligible to hold the office of commissioner or become or be an employee or agent of the department of revenue.

Section 7. (a) There is hereby provided to all counties having less than twenty-five thousand (25,000) population and wherein at the time of passage of this act a commercial site for the disposal of hazardous waste or hazardous substances is located an annual payment of two and one-half percent ($2\frac{1}{2}\%$) of the additional eighteen dollars (\$18) per ton gross receipts generated by subsection (a) and the additional seventy-two dollars (\$72) per ton generated by subsection (b) of Section 3 of this Act that become effective July 15, 1990.

(b) Said counties as identified in subsection (a) above are hereby guaranteed an amount not to exceed the lesser of four million two hundred thousand dollars (\$4,200,000) or one hundred percent (100%) of the receipts to the State paid on wastes or substances disposed of in said county. In determining whether said counties are entitled to receive benefit of all or any portion of the guarantee herein made, there shall be charged against said counties all receipts which they receive pursuant to this chapter and the provisions of Alabama Act 83-480 or other applicable local act.

(c) Determination of entitlement to the guarantee shall be made annually by the Governor or his designee not later than November 15. Such determination shall be the difference of this chapter and Alabama Act 83-480 and any other applicable local act for the twelve-month period ending the previous September 30 as compared to the applicable guarantee amount.

(d) In the event the guarantee provided in subsection (b) is required to be exercised, the Department of Revenue shall, within ten (10) days of notification from the Governor or his designee, certify to the state finance director that an appropriate amount as determined in subsection (c) from the first receipts generated by this act in each fiscal year shall be paid to the appropriate county commission. The state finance director is hereby authorized to cause to be paid from current state revenues generated by this Act said amount which shall be paid as a reduction of current fiscal year revenues to the state, which said payment shall not in any event exceed an amount equal to the total current fiscal year revenues generated by this Act and paid into the state treasury. The county commission shall, within ten (10) days of receipt of said funds, disburse the funds according to the provisions of Alabama Act 83-480 or other applicable general or local laws.

Section 8. For the purpose of providing funds, not to exceed four million five hundred thousand dollars (\$4,500,000) during any fiscal year of the State, for the Alabama Public Health Finance Authority to pay at their respective maturities the principal of, premiums, if any, and interest on any bonds issued by it under the provisions of House Bill 114 of the Regular Session of 1990 or Senate Bill 84 of the Regular Session of 1990, there is hereby irrevocably pledged for said above purpose and hereby appropriated the annual amount necessary, not to exceed four million five hundred thousand dollars (\$4,500,000) during any fiscal year of the State, from the

first receipts after payment of any guarantees in Section 7 of this Act of the incremental fees that are levied on the disposal of hazardous waste or hazardous substances pursuant to this act and that were not theretofore appropriated and paid into the General Fund of the State of Alabama (i.e., the amount resulting from the incremental fee of \$18.00 per ton for all waste or substances disposed of at each commercial site for the disposal of hazardous waste or hazardous substances and the amount resulting from the additional fee of \$72.00 per ton for all waste and substances which are generated outside of Alabama and disposed of at each commercial site for the disposal of hazardous waste or hazardous substances). The Alabama Public Health Finance Authority referred to in this section may be organized pursuant to House Bill 114 of the Regular Session of 1990 or Senate Bill 84 of the Regular Session of 1990, either of which bills may be enacted before or after this act. Provided, however, if said Alabama Public Health Finance Authority is not in existence on the effective date of this act, the funds provided for in this section shall be deposited into the state general fund until enactment of legislation establishing the aforementioned Alabama Public Health Finance Authority.

Section 9. Any commercial site for the disposal of hazardous waste or hazardous substances that disposes of in excess of 100,000 tons of hazardous waste or hazardous substances during the twelve-month period beginning July 15, 1990, and ending July 14, 1991, (hereinafter referred as the benchmark period) shall not, during any twelve-month period beginning October 1, 1991, and any twelve-month period thereafter, dispose of more than the tonnage received during said benchmark period. Such restriction shall be in addition to any other ban or restrictions on disposal imposed by any regulatory authority. Provided, however, that the Governor or the Governor's designee may allow disposal of hazardous wastes or hazardous substances in excess of the tonnage disposed of

during the benchmark period if such action is determined by the Governor or the Governor's designee to be necessary to protect human health or the environment in the state, or to allow the State to comply with its obligations to assure disposal capacity pursuant to applicable state or federal law as determined by the Governor or his designee.

Section 9. Nothing in this amendatory act or any other law shall prohibit the enactment of any local law levying an additional fee to be paid by the operators of commercial sites for the disposal of hazardous waste or hazardous substances.

Section 10. The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 11. This act shall become effective on July 15, 1990, upon its approval by the Governor, or upon its otherwise becoming a law.

/s/ James A. Clark
Speaker of the House of
Representatives

/s/ Ryan W. Gassenried, Jr.
President Pro Tem and Pre-
siding Officer of the Senate

House of Representatives

I hereby certify that the within Act originated in and was passed by the House February 8, 1990, as amended.

John W. Pemberton
Clerk

Senate April 5, 1990 Amended and Passed

House April 5, 1990 Concurred in Senate
 Amendment

[No. 90-326, Received Apr. 17, 1990, Secretary of State]

OCT 21 1991

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC.,
Petitioner,

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA; ALABAMA DEPARTMENT OF REVENUE; and JAMES M. SIZEMORE, JR., COMMISSIONER OF THE ALABAMA DEPARTMENT OF REVENUE,

Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Alabama

BRIEF IN OPPOSITION

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Alabama Department of Revenue

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QUESTIONS PRESENTED

1. Where the health and safety of Alabama's citizens, and its environment, are placed at risk by the landfilling of hazardous waste at Petitioner's commercial facility (which receives 85% to 90% of its hazardous waste from out-of-state), does the Commerce Clause prohibit Alabama from limiting the health, safety and environmental risks by imposing a disincentive in the form of a \$72 per ton disposal fee upon such imported hazardous waste.

2. Does a \$25.60 per ton levy imposed evenhandedly on the commercial landfilling of in-state and out-of-state hazardous waste violate the Commerce Clause simply because the levy does not apply to non-commercial disposal of hazardous waste, and Petitioner's commercial activity most often involves out-of-state hazardous waste.

3. Does the Cap Provision, which limits growth in the annual volumes of landfilled hazardous waste and applies evenhandedly regardless of the origin of the waste, violate the Commerce Clause.

RULE 29.1 STATEMENT

All parties to this case in the Court below are listed in the caption.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

 No. 91-471

CHEMICAL WASTE MANAGEMENT, INC.,
Petitioner,

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA; ALABAMA DEPARTMENT OF REVENUE; and JAMES M. Sizemore, Jr., COMMISSIONER OF THE ALABAMA DEPARTMENT OF REVENUE,

Respondents.

On Petition for a Writ of Certiorari to the
 Supreme Court of Alabama

BRIEF IN OPPOSITION

STATEMENT

1. *The Emelle Facility.* In 1989, Petitioner's Emelle facility received 788,000 tons of hazardous waste, representing approximately 17% of all hazardous waste generated throughout the country and landfilled in the United States. Pet. App. 57a, 58a. This hazardous waste was transported to Emelle over the public highways in Alabama in approximately 40,000 truckloads. Pet. App. 62a. Without restrictions imposed by legislation, the quantities

were expected to continue to increase annually. Pet. App. 58a. Of the hazardous waste received and landfilled at Emelle, 85% to 90% was imported from other parts of the country. Pet. App. 58a.

2. *Risks to Health, Safety, Environment.* The hazardous wastes landfilled at Emelle are inherently dangerous to human health and safety and to the environment. Such wastes consist of ignitable, corrosive, toxic and reactive wastes which contain poisonous and cancer causing chemicals and which can cause birth defects, genetic damage, blindness, crippling and death. Pet. App. 59a. Landfilling is the least desirable means of hazardous waste disposal. Pet. App. 59a. These hazardous wastes are inherently dangerous in their transportation and movement into or from one place to another throughout the State. Pet. App. 62a. The risks are increased by the increased volumes. Pet. App. 62a.

3. *The Challenged Statute.* In 1990, the Alabama Legislature enacted the challenged statute, which seeks to encourage business and industry to develop technology to eliminate or reduce the generation and landfilling of hazardous wastes and substances by imposing economic disincentives in the form of fees upon the commercial landfilling of such substances in Alabama and by limiting the annual volumes of such wastes which may be landfilled in future years. Equally important, the fees provide funds for the cost of maintenance, monitoring and eventual environmental cleanup.

4. *The Decisions below.* Following a four-day trial, and based upon the testimony at the trial as well as documentary evidence and testimony offered through thousands of pages of depositions, the trial court entered detailed findings of fact and conclusions of law. Pet. App. 50a-94a. The trial court concluded the Base Fee (the \$25.60 per ton fee) and the Cap Provision (annual volume limitation) were valid, but held the Additional Fee (the \$72.00 per ton fee applied only to imported waste) to be

violative of the Commerce Clause. The trial court's decision does not mention or attempt to distinguish this Court's decision in *Maine v. Taylor*, 477 U.S. 131 (1986), the case relied upon primarily by the State of Alabama below, in its analysis of the Additional Fee issue. The Alabama Supreme Court, based upon the findings of fact of the trial court and precedents of this Court, including and especially *Maine v. Taylor*, concluded the trial court's decision was in error on the Additional Fee issue and reversed the trial court on that issue while affirming the decision on the Base Fee and Cap Provision issues.

5. *Misstatement of Facts by Petitioner.* In accordance with the admonishment in Rule 15.1, Respondents are compelled to address a misstatement of the facts by Petitioner. Petitioner has referred to "over 3 million tons" of waste and cited statistics relating to quantities of hazardous wastes disposed of in Alabama, which statistics are highly misleading in the context in which they are used. The 1987 data relied on by Petitioner (Pet. at 5 n. 2) to support its claim that large amounts of Alabama-generated waste are disposed of noncommercially in Alabama and therefore not subject to the provisions of Act 90-326, is taken from the 1987 Calendar Year Hazardous Waste Biennial Report for the State of Alabama. Pl. Exh. 27.

Of the approximately 3 million tons of Alabama-generated waste covered by this report and referred to by Petitioner, about 80% was wastewater. Pl. Exh. 27 at 45. As indicated by Petitioner, approximately 690,000 tons of this wastewater was disposed of in surface impoundments in 1987. Pet. at 5 n. 2, citing Pl. Exh. 27 at 64. However, as is also indicated in Pl. Exh. 27 at 64, but not mentioned by Petitioner, this disposal ceased almost totally in 1987 when the generator of virtually all (99.7%) of this waste made process conversions which eliminated the generation of this waste. The remainder of the wastes which Petitioner erroneously states would

fall within the definition of "disposal" consisted primarily of wastewater which was *treated* in surface impoundments (1.7 million tons), along with some 71,000 tons of wastewater stored in surface impoundments while awaiting treatment and 162,000 tons of waste *stored* in waste piles awaiting treatment, recycling, disposal or other disposition. Pl. Exh. 27 at 45.

Contrary to Petitioner's statements (Pet. 5 and n. 2, 19) wastewater treatment is not "disposal," nor is it comparable in terms of environmental risk to Petitioner's landfilling activity. The temporary storage of waste prior to disposal is not "disposal" as contemplated by the Act. After subtracting from the 1987 figures upon which Petitioner relies the tons of wastewater treated in surface impoundment, the surface impoundment disposal which ceased in 1987, and waste in temporary storage, the total Alabama-generated waste shown by this report to fall within the definition of "disposal" in Act 90-326 consists of 52 tons of waste disposed of by land application, about 4,000 tons incinerated (Pl. Exh. 27, at 45), and about 37,000 tons landfilled, most of which was landfilled in Petitioner's facility. Pet. 5 n. 2.¹

In 1989, the year preceding enactment of the challenged statute, Petitioner's facility received 68,000 to 69,000 tons of Alabama-generated waste and over 700,000 tons of out-of-state waste. Pet. App. 16a. The only hazardous waste landfill in the State other than Petitioner's facility is a relatively small noncommercial facility which landfills about 4,000 tons per year of on-site generated waste. Pet. App. 16a. This is the only noncommercial disposal in the State which is qualitatively comparable to

¹ These data include only wastes classified and regulated under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* ("RCRA"). The data does not include toxic wastes regulated under other statutes or other dangerous industrial wastes landfilled at Petitioner's commercial facility. The trial court's findings, which include all such waste, show total volumes of waste landfilled at Petitioner's facility in recent years. See Pet. App. 57a.

Petitioner's disposal activities. Based on these figures, about 95% of the total in-state hazardous waste landfilled in Alabama is subject to Act 90-326.

SUMMARY OF ARGUMENT

The serious health, safety and environmental problems faced by the various states, and thus by the country, resulting from the generation and landfilling of hazardous waste, present significant political issues of emerging importance. Comprehensive legislation, not piecemeal judicial determination, will be needed to address these issues.

The record fully supports the trial court's findings that Alabama has a legitimate interest in guarding against the various health, safety and environmental risks posed by the transportation and landfilling of enormous quantities of inherently dangerous hazardous wastes. The Alabama Supreme Court correctly applied the legal principles announced in decisions in this Court, particularly *Maine v. Taylor*, 477 U.S. 131 (1986), to the specific findings of the trial court in this case in finding the Additional Fee does not violate the Commerce Clause. The decision does not conflict with the precedents of this Court.

The Base Fee and Cap Provisions apply evenhandedly to in-state and out-of-state wastes to effect legitimate local purposes. The trial court and the Alabama Supreme Court correctly applied principles announced in prior cases of this Court, particularly *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), in upholding the Base Fee and Cap Provisions.

The issues giving rise to the dispute in this case will ultimately require resolution by Congress at the national level. There is no need for this Court to devote its resources to the issues of this case.

REASONS FOR DENYING THE PETITION

I. AT THE NATIONAL LEVEL, THE COUNTRY'S WASTE DISPOSAL PROBLEMS ARE MORE APPROPRIATE FOR RESOLUTION BY THE CONGRESS THAN BY THIS COURT.

It cannot be disputed that this country faces serious problems with respect to disposal of wastes, or that issues relating to waste disposal, including issues relating to the movement of waste from one state for disposal in another, are significant political issues of emerging importance.

Twenty-two states totally ban the commercial landfilling of any of the types of hazardous wastes involved in this case within their borders, refusing to accept to any degree the risks which Alabama seeks merely to limit and control. See R. 443, 444. These states have de facto bans against the importation of the out-of-state wastes by not permitting facilities for the landfilling of such wastes within the state. Some of these states have permitted on-site landfills for their own industry (see R. 457), but have not permitted commercial landfills. See R. 448. Other states will not accept any landfilling of such waste. See R. 448, 457.

Although hazardous waste landfills can be designed and engineered to operate in practically every state, only a few commercial sites exist. Pet. App. 57a. Public resistance, not a lack of technical feasibility or any value of commerce, is the reason for the existing levels of interstate shipment of wastes. Pet. App. 57a. See also R. 2278, TR. 126, 623. The present level of traffic in such waste is not due to the value of commerce in the waste, it is due instead to the fact that other states force it to be exported due to the negative value, the risk, of having it within the state.²

² Since November 17, 1980, the effective date of RCRA, only one additional hazardous waste landfill has been permitted in the United States. That facility, in Last Chance, Colorado, at the time of trial, had never opened or accepted waste and was for sale. Pet. App. 57a.

Addressing waste disposal problems at the national level by addressing the political tensions between states, some of which may actually need to export some wastes, some of which export waste due to public resistance to disposal within the state, and some of which are burdened with receiving large volumes of waste from other states, is the responsibility of Congress. These issues are policy issues in need of a comprehensive legislative solution by Congress, not constitutional issues in need of piecemeal judicial resolution by this Court.

The Court might clarify the constitutional rule in this case by affirming or reversing, but a decision by this Court either way will not resolve the policy issues relating to waste disposal. These policy issues, not the constitutional issues raised in this case, are the questions which have practical significance. Congress is the appropriate forum for reaching a political solution to these policy issues, a solution which can accommodate both waste disposal needs at the national level and the need to protect health, safety and the environment at the local level from the dangers associated with overwhelming volumes of imported wastes. A legislative compromise is needed to address the underlying problems.³ The nation's waste

³ Congress has undertaken such a comprehensive legislative solution with respect to the interstate movement of municipal solid waste. Legislation is pending which would specifically provide limited short-term protection for interstate movement of wastes while allowing higher fees to be levied on imported wastes, with the permissible differential increasing in the future, and specifically providing for states to ban the importation of such wastes and defining the circumstances under which such bans may be implemented. See The Resource Conservation and Recovery Act Amendments of 1991, S. 976, 102d Cong., 1st Sess., § 407. This comprehensive federal legislation on the subject would leave the dormant commerce clause issues in this case irrelevant with respect to wastes covered by the legislation. Most of the cases cited by Petitioner as pending in various courts (Pet. 17) involve wastes which would be covered and issues which would be rendered moot by this legislation. In addition, this legislation shows the type of

disposal problems will not be solved by elevating Petitioner's activity of moving problems from one place to another to the unique and unprecedented level of constitutional protection sought by Petitioner, nor will this Court solve the nation's waste disposal problems by reaffirming the constitutional principles stated and applied by this Court in *Maine v. Taylor* and followed by the Supreme Court of Alabama in this case.

If the problems giving rise to the dispute in this case require resolution at the national level, such resolution should be fashioned by Congress. Under these circumstances, there is no need for this Court to devote its resources to the issues of this case.

II. THE ALABAMA SUPREME COURT'S DECISION UPHOLDING THE \$72 ADDITIONAL FEE DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT. THE \$72 PER TON DISINCENTIVE LEVIED ON THE DISPOSAL OF OUT-OF-STATE HAZARDOUS WASTE IN ALABAMA IS A LEGITIMATE EXERCISE OF THE STATE'S POLICE POWER TO LIMIT RISKS TO HEALTH, SAFETY, AND THE ENVIRONMENT.

The fundamental issue in dispute in this case involves the interpretation of this Court's decision in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). Does that decision hold that the commerce clause forbids *all* state restrictions on the importation of wastes, regardless of the effects of the importation on the local community? Or may restrictions on the importation of wastes, like restrictions on the importation of any other item, be upheld where based on the protection of public health, safety, or the environment?

creative, comprehensive legislative compromise needed to balance the needs and interests of the various states, and demonstrates the ability of the political processes in the legislative branch to fashion and implement such a comprehensive compromise solution.

Petitioner asks this Court to review and reverse the decision of the Supreme Court of Alabama and establish as a rule of constitutional law the following:

If a state permits the disposal within its borders of its own noxious items which threaten public health, safety and the environment, then the state must also accept and allow disposal within the state, on the same terms and without limitations, unlimited volumes of all such noxious items from all other states, regardless of the risks thereby created to the health and safety of citizens of the recipient state and to its environment.

Petitioner argues that such a rule follows from this Court's decision in *Philadelphia v. New Jersey*. Petitioner's construction of *Philadelphia v. New Jersey* would place that case in direct conflict with every relevant decision of this Court before and since that decision.

It is clear that the majority opinion in *Philadelphia v. New Jersey* considered New Jersey's ban on out-of-state garbage to amount to simple economic protectionism, protecting New Jersey residents from out-of-state competition for landfill space. This Court has consistently characterized *Philadelphia v. New Jersey* as a case involving economic protectionism, in contrast to environmental protection. For example, in *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456 (1981), this Court cited *Philadelphia v. New Jersey* as supplying the rule of decision where "a state law purporting to promote environmental purposes is in reality 'simple economic protectionism'." *Id.* at 471. In *Maine v. Taylor*, 477 U.S. 131 (1986), this Court cited *Philadelphia v. New Jersey* for the proposition that "[s]hielding in-state industries from out-of-state competition is almost never a legitimate local purpose, and state laws that amount to 'simple economic protectionism' consequently have been subject to a 'virtually per se rule of invalidity'" while, in contrast to *Philadelphia v. New Jersey*, "there is little reason in

this case to believe that the legitimate justifications that the state has put forward for its statute are merely a sham or a 'post hoc rationalization.'" *Maine v. Taylor*, 477 U.S. at 148-49. Again, in *Maine v. Taylor*, this Court used *Philadelphia v. New Jersey* as an example of a case *in contrast* to cases "where, as in this case, out-of-state goods or services are particularly likely for some reason to threaten the health and safety of a state's citizens or the integrity of its natural resources" to make the point that "[n]ot all intentional barriers to interstate trade are protectionist, however, and the Commerce Clause 'is not a guarantee of the right to import into a state whatever one may please, absent a prohibition by Congress, regardless of the effects of the importation upon the local community.'" *Maine v. Taylor*, 477 U.S. at 148 n.19 (quoting *Robertson v. California*, 328 U.S. 440, 458 (1946)).

The Supreme Court of Alabama correctly observed that this Court's decisions "make a distinction between state measures that discriminate arbitrarily against out-of-state commerce in order to give in-state interests a commercial advantage, i.e., simple economic protectionism, and state measures that seek to protect public health or safety or the environment," citing *Maine v. Taylor*, 477 U.S. at 148 n.19 (1986). Pet. App. 41a. Although this Court made exactly such a distinction in *Maine v. Taylor*, Petitioner claims that this Court's decisions "expressly and conclusively reject the Alabama Supreme Court's 'distinction'." Pet. 12. To the contrary, as this Court has stated, "[t]his distinction between the power of the State to shelter its people from menaces to their health or safety . . . , even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law." *H. P. Hood & Sons v. DuMond*, 336 U.S. 525, 533 (1949).

Contrary to Petitioner's interpretation of the case, *Philadelphia v. New Jersey* does not eliminate this fundamental distinction and elevate wastes to a special and unique status under the Commerce Clause. *Philadelphia v. New Jersey* merely holds that state measures discriminating against out-of-state waste are subject to the same review under the Commerce Clause as state measures discriminating against other out-of-state items. But Petitioner's argument leaps from the result in *Philadelphia v. New Jersey* to the conclusion that any state restriction on the importation of waste must be held invalid, without regard to whether the case involves health, safety, or the environmental protection, or merely simple economic protectionism.⁴

Petitioner mischaracterizes the holding of the Eleventh Circuit in *National Solid Wastes Management Ass'n v. Alabama Dep't of Environmental Regulation* ("NSWMA"), 910 F.2d 713 (11th Cir. 1990), *modified*, 924 F.2d 1001, *cert. denied*, 111 S.Ct. 2800 (1991), in order to advance the argument that the decision below is in conflict with that Eleventh Circuit decision. The Eleventh Circuit did not hold that Alabama must accept unlimited volumes of out-of-state hazardous waste on the same terms as the State deals with its own such waste; instead, that court held that the State could not selectively ban waste from certain other states on the basis of state of origin rather than on the basis of the danger to the

⁴ This Court rejected New Jersey's argument that its ban on out-of-state garbage was analogous to health-protective measures which this Court had repeatedly upheld, by distinguishing the quarantine cases as involving restrictions on articles whose "very movement risked contagion and other evils," from the ordinary garbage where there was "no claim here that the very movement of waste into or through New Jersey endangers health." *Philadelphia v. New Jersey*, 437 U.S. at 628-29. In contrast, the trial court in this case found that "[t]he hazardous wastes landfilled at the Emelle facility are inherently dangerous in their transportation and movement into or from one place to another throughout the State of Alabama." Pet. App. 62a.

State of allowing such waste to be brought into the State. Dicta in the Eleventh Circuit opinion may indicate a somewhat different understanding of this Court's decision in *Philadelphia v. New Jersey* and a lack of appreciation of the principles enunciated by this Court in *Maine v. Taylor*. Nevertheless, the holding that the State may not single out wastes from specific states on the basis of which state the waste comes from is not in direct conflict with the holding of the Supreme Court of Alabama that the State may act to reduce the overall volume of such waste coming into the State on the basis of the dangers created by the importation of the waste.⁵

⁵ The other decisions of the courts of appeal cited by Petitioner are likewise not in direct conflict with the decision below. All of these decisions except the Eleventh Circuit decision discussed in the text pre-date this Court's decision in *Maine v. Taylor*. Two of these decisions involved state regulations which were preempted by congressional legislation governing disposal of radioactive wastes. See *Washington State Building & Construction Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982), cert. denied, 461 U.S. 913 (1983); *Illinois v. General Electric Co.*, 683 F.2d 206 (7th Cir. 1982), cert. denied, 461 U.S. 913 (1983). And *Hardage v. Atkins*, 582 F.2d 1264 (10th Cir. 1978), which struck down a reciprocity statute, interpreted *Philadelphia v. New Jersey* in a manner consistent with and supportive of the decision below—"the Supreme Court concluded that the New Jersey statute was purely an economic protectionist measure." *Hardage*, 582 F.2d at 1266 (emphasis added).

Subsequent to the filing of the Petition, the Fourth Circuit has upheld a preliminary injunction against enforcement of South Carolina measures creating a mandatory preference for in-state waste and imposing selective limitations on waste imports from other states. *Hazardous Waste Treatment Council v. South Carolina*, slip op., No. 91-2317 (4th Cir. Sept. 20, 1991). The Fourth Circuit did not decide the merits of the case. The Alabama statute in this case, unlike the South Carolina statutes and regulations, does not reserve disposal capacity for in-state use and does not selectively target wastes based on which other state the waste comes from. Like the decision of the Eleventh Circuit in *NSWMA*, the Fourth Circuit opinion may indicate an interpretation of *Philadelphia v. New Jersey* which differs somewhat from that of the Alabama Supreme Court. However, to the extent that these deci-

The interpretation of the Commerce Clause advanced by Petitioner simply cannot be reconciled with this Court's decision in *Maine v. Taylor* and numerous earlier decisions of this Court recognizing the power of the states to regulate the importation in interstate commerce of items which pose threats to the health, safety or environment of the state.⁶ It is illogical, and indeed ridiculous, to assert that while the Commerce Clause allows a state to restrict the importation of baitfish on the grounds that some of the imported baitfish *might* cause some disturbance in the aquatic ecology, the Commerce Clause requires states to suffer the importation of unlimited volumes of hazardous wastes. These wastes, without dispute, "are inherently dangerous to human health and safety and to the environment" and consist of "wastes which contain poisonous and cancer causing chemicals and which can cause birth defects, genetic damage, blindness, crippling and death." Pet. App. 11a.

The Supreme Court of Alabama correctly followed this Court's decision in *Maine v. Taylor*. Alabama has a legitimate purpose in seeking to reduce the large volume of highly dangerous waste materials being brought into

sions of the Fourth and Eleventh Circuits might be read as conflicting with the decision of the Supreme Court of Alabama in this case, the decisions would also conflict to the same extent with this Court's opinion in *Maine v. Taylor*.

⁶ For examples, see *Oregon-Washington R. & Nav. Co. v. Washington*, 270 U.S. 87 (1926); *Sligh v. Kirkwood*, 237 U.S. 52 (1915); *Asbell v. Kansas*, 209 U.S. 251 (1908); *Crossman v. Lurman*, 192 U.S. 189 (1904); *Reid v. Colorado*, 187 U.S. 137 (1902); *Compagnie Francaise v. State Bd. of Health, Louisiana*, 186 U.S. 380 (1902); *Smith v. St. Louis & Southwestern R. Co.*, 181 U.S. 248 (1901); *Rasmussen v. Idaho*, 181 U.S. 198 (1901); *Louisiana v. Texas*, 176 U.S. 1 (1899); *Missouri, Kansas, & Texas R. Co. v. Haber*, 169 U.S. 613 (1898); *Kimmish v. Ball*, 129 U.S. 217 (1889); see also *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Mintz v. Baldwin*, 289 U.S. 346 (1933); *Bowman v. Chicago & Northwestern R. Co.*, 125 U.S. 465 (1888); *Hannibal and St. Joseph R.R. Co. v. Husen*, 95 U.S. 465 (1878).

the state for burial. The \$72.00 per ton economic disincentive advances this purpose by encouraging a reduction of the volume of such wastes being brought into the state.⁷ The only imported wastes subject to the fee are dangerous wastes. Therefore, there are no less discriminatory alternatives, such as inspection or testing, to identify those wastes which are dangerous—only dangerous wastes become subject to the fee, because only those dangerous wastes are disposed of in commercial hazardous waste disposal facilities. There is no basis in this Court's decision for Petitioner's contention that the "available nondiscriminatory alternative" prong of the test requires that the State accept and dispose of out-of-state noxious items on the same terms which the State applies in dealing with its own such noxious items.⁸ Alabama has a

⁷ The use of an economic disincentive to influence and regulate behavior is not a novel idea, and is especially appropriate in the area of environmental regulation because it both allows for and forces a transition to alternatives while allowing the greatest flexibility in developing alternatives to the discouraged activity. For example, in sections 4861-62 of the *Internal Revenue Code*, Congress has implemented an economic disincentive in the form of an excise tax on ozone-depleting chemicals. The excise is scheduled to increase annually to ratchet up the disincentive, thereby increasing the incentive to find and use alternatives. Similarly, the "Gas Guzzler" excise tax in section 4064 of the *Internal Revenue Code* imposes a deterrent levy of up to \$7,700 (as doubled in 1990) on cars failing to meet specified fuel economy standards. These measures, like the Additional Fee, are not designed primarily to produce revenue; the ultimate objective is that the environmental measures work and produce no revenue at all.

⁸ In fact, this Court's decisions clearly show that how the state deals with problems already existent within the state is not determinative of how the state may deal with the importation of more such problems. For example, the First Circuit decision which this Court reversed in *Maine v. Taylor* would have struck down Maine's ban on the importation of baitfish in part because "Maine provides no protection against in-state parasites and related harms that may exist at large in in-state hatcheries." *U.S. v. Taylor*, 752 F.2d 757, 765 (1st Cir. 1985). This Court did not find it relevant to discuss how Maine dealt with such problems within the state in reaching

reason, apart from the origin of the wastes, to limit importation of the wastes—they are wastes which are "inherently dangerous to human health and safety and to the environment." Pet. App. 11a. The decision below is in accord with this Court's decisions and does not warrant this Court's review.

III. THE BASE FEE OF \$25.60 PER TON, IMPOSED EVENHANDEDLY ON THE COMMERCIAL LAND-FILLING OF IN-STATE AND OUT-OF-STATE WASTE, DOES NOT VIOLATE THE COMMERCE CLAUSE FACIALLY OR IN ITS PRACTICAL EFFECT.

The "commerce" upon which the Base Fee is levied is the *commercial* disposal of wastes. The Base Fee applies identically to this commerce, whether interstate or intrastate.

The Base Fee is a fee levied on operators of commercial facilities, based on the volume of business, without any distinction as to the origin of the business. The effect of the Base Fee falls equally on both in-state and out-of-state customers of a commercial facility. The Base Fee applies identically to Petitioner's transactions dealing with both in-state and out-of-state wastes. It does not discriminate against interstate commerce.

the conclusion that Maine could prevent the importation of more such problems, and dismissed as being of "little relevance" the fact that the fish which Maine did not allow to be imported could simply swim in from New Hampshire. *Maine v. Taylor*, 477 U.S. at 151. Earlier cases involving discrimination against out-of-state livestock considered alternatives—whether the measure sufficiently targeted only those animals posing the danger to be protected against without unnecessarily discriminating against healthy animals—but these cases did not compare the measures employed to deal with the out-of-state cattle to the measures employed by the state to deal with in-state sick animals. See *Asbell v. Kansas*, 209 U.S. 251 (1908); *Reid v. Colorado*, 187 U.S. 137 (1902); *Smith v. St. Louis & South Western R. Co.*, 181 U.S. 248 (1901); *Missouri, Kansas & Texas R. Co. v. Haber*, 169 U.S. 613 (1898); *Hannibal and St. Joseph R.R. Co. v. Husen*, 95 U.S. 465 (1878).

Petitioner argues that the Base Fee discriminates against out-of-state waste in its practical effect, because it applies to Petitioner's commercial transactions but not to industries which manage their own wastes. Petitioner can point to no discrimination against interstate commerce, such as was present in the cases it cites.⁹ Instead, Petitioner asserts that the State cannot levy any tax on its commercial activity of waste disposal because the State does not also levy the same tax on industries which manage their own wastes. Under Petitioner's illogical construction of the Commerce Clause, states would be precluded from taxing most commercial activities, if the commercial activity included interstate commerce, on the basis that residents of the state could engage in a similar activity noncommercially and thus be "exempted."¹⁰

⁹ The cases relied upon by Petitioner in its attempt to fabricate the existence of a conflict or some confusion on this issue, Pet. 25-27, all dealt with economic favoritism for commercial transactions involving in-state products, with commercial transactions in out-of-state products receiving disfavorable treatment in comparison to identical commercial transactions in in-state products. None of these cases provide any support for Petitioner's argument that a tax may be found to discriminate against interstate commerce by falling equally on both interstate and intrastate commercial activity but "exempting" noncommercial activity, nor do these cases indicate any confusion on the part of lower courts or need for guidance by this Court.

¹⁰ Petitioner fails to address the host of problems which would plague the application, as a rule of general applicability, of the Commerce Clause standard Petitioner seeks to have established. To what extent would a taxed commercial activity have to involve interstate commerce before the tax was considered to discriminate in practical effect? How much noncommercial activity would have to be "exempted"? Few commercial activities do not involve interstate commerce to some extent, and few taxes fall on noncommercial activity. Does the validity of "bed" taxes on commercial lodging accommodations turn on how often such taxes fall on out-of-state travelers? Although Petitioner might not concede the point, there appears to be no question that the State could levy a tax on Petitioner's commercial activity measuring volume of business by gross dollar receipts, which tax would not fall on noncommercial activity

Petitioner's argument is that the Base Fee discriminates against interstate commerce because the "exemption" of noncommercial activity "has the practical effect of shifting a disproportionate tax burden to interstate commerce." (Pet. 23.)¹¹ Like the out-of-state utilities challenging Montana's coal severance tax, "the gravamen of [Petitioner's] claim is that a state tax must be considered discriminatory for purposes of the Commerce Clause if the tax burden is borne primarily by out-of-state consumers." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618 (1981). Unlike those challenging the Montana tax, who were candid enough to "not suggest that this assertion is based on any of this Court's prior discriminatory tax cases," *id.*, Petitioner makes this assertion after this Court has clearly rejected it. *See id.* at 617-19.

Petitioner attempts to distinguish the cases relied upon by the courts below, claiming that the legislature has "exempted" in-state waste by applying the Base Fee only to commercial disposal. Petitioner does not even limit itself to arguing that the Base Fee does not apply to non-

because such noncommercial activity would generate no monetary receipts. Is measuring the volume of Petitioner's commercial activity in tons rather than dollars a distinction of constitutional significance? Does the constitutionality of a gross receipts tax depend upon what proportion of the receipts come from interstate commerce, and to what extent in-state residents may engage in similar transactions or activity noncommercially, thereby being exempted?

¹¹ The proportionality prong of this Court's four-part test from *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), requires that a tax be "fairly related to the services provided by the state," *id.* at 279, and is satisfied if the tax is assessed in proportion to the taxpayer's activities or presence in the state. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 627 (1981). A state tax imposes a disproportionate burden on interstate commerce "when the measure of [the] tax bears no relationship to the taxpayer's presence or activities in a state." *Id.* at 629. It is difficult to imagine a tax more perfectly proportional to a taxpayer's commercial activity of burying waste in the ground than a per-ton fee on that very activity.

commercial activity *similar* to that in which Petitioner engages commercially—landfilling of waste. The statistics Petitioner uses in claiming that most in-state waste is not subject to the Base Fee consist almost entirely of millions of tons of waste water which is treated and cleaned up, and waste in storage. As discussed previously, these numbers are highly misleading in the context in which Petitioner uses them.¹²

If any comparison between Petitioner's commercial activity and other noncommercial activity were relevant, the proper comparison would be to similar activity. There is only one other hazardous waste landfill in the State, a noncommercial on-site facility handling about 4,000 tons per year. (Pet. App. 16a.) Aside from the company which owns that landfill and disposes of its own waste on-site, all in-state hazardous waste landfilled in Alabama is landfilled in Petitioner's facility and is subject to the Base Fee. With the sole exception of that one company which has its own small landfill, all in-state generators who landfill hazardous wastes in Alabama find 100% of their landfilled wastes subject to the Base Fee, and every Alabama waste generator who landfills waste in the State is affected in the exact same way as any out-of-state generator who landfills waste in Alabama. Petitioner has to resort to counting tons of water treated to attempt to support its claim that the Base Fee "exempts" in-state waste. Of the approximately 73,000 total tons of in-state waste landfilled in Alabama in 1989, about 69,000 tons were landfilled at Emelle, and about 4,000 tons at the on-site landfill. Pet. App. 16a. Based on these figures, about 95% of the in-state landfilled waste would be subject to the Base Fee.

The Legislative Findings show a concern about *increasing amounts* of hazardous waste being landfilled. See Ala. Code § 22-30B-1.1, Pet. App. 102a-104a. The one non-commercial landfill is used by one company which gen-

¹² See Misstatement of Facts by Petitioner, *supra* at 3.

erates waste at the rate of about 4,000 tons per year. Pet. App. 16a. At Petitioner's landfill, on the other hand, volume has increased dramatically in recent years, reaching 788,000 tons in 1989 (Pet. App. 9a), on average more waste in two days than the noncommercial landfill handles in an entire year. There is no *comparable* facility or activity in the State not subject to the Base Fee.

Even if it were factually correct that any significant amount of comparable noncommercial activity was not subject to the Base Fee, there is absolutely no legal support for Petitioner's argument that a tax which applies equally to interstate and intrastate commercial activity violates the Commerce Clause by not also applying to non-commercial activity.

Recognizing the regulatory function of the Base Fee in evenhandedly deterring Petitioner's large-volume hazardous waste landfilling, the courts below applied the principles set forth by this Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), and upheld the Base Fee. The decision below is based on and in accord with settled law and there is no reason for review by this Court.

IV. THE CAP PROVISION, WHICH LIMITS FUTURE GROWTH IN THE ANNUAL VOLUMES OF LANDFILLED HAZARDOUS WASTE AND APPLIES EVENHANDEDLY REGARDLESS OF THE ORIGIN OF THE WASTE, DOES NOT VIOLATE THE COMMERCE CLAUSE.

Like the Base Fee provision, the Cap Provision is not facially discriminatory. It provides that no commercial facility which takes in more than 100,000 tons of hazardous waste annually may dispose of more waste in the year starting October 1, 1991, than it disposed of during the statutory benchmark period, regardless of the origin of the waste. Petitioner's basic position is that Petitioner, and not the Alabama legislature, has the power to determine what volume of hazardous waste will be buried in

the State, and that the Cap Provision, like the fees, is an impermissible legislative interference with Petitioner's rights to leave Alabama holding whatever amount of such waste Petitioner wishes to bury in the State.

Like the Base Fee, the Cap Provision regulates evenhandedly to effectuate a legitimate local interest. Tonnage restrictions which apply equally to all waste, regardless of origin, have not been held to violate the Commerce Clause. *Wetzel County Solid Waste Authority v. West Va. Div. of Natural Resources*, 401 S.E.2d 227 (W. Va. 1990). The Fourth Circuit has observed that "South Carolina may preserve the [disposal] capacity by limiting total disposal and treatment within the state without reference to whether in-state or out-of-state waste is actually involved." *Hazardous Waste Treatment Council*, slip op. at 21. And the Eleventh Circuit has upheld a preliminary injunction against enforcement of a complete ban on imported waste on the grounds that the county involved could have achieved its goals with a lesser burden on interstate commerce, by imposing "tonnage limits on imported waste" or by auctioning permits for disposal of "fixed amounts of imported waste." *Diamond Waste, Inc. v. Monroe County*, 939 F.2d 941, 945 (11th Cir. 1991) (emphasis added).¹³

The courts below found that the State has a clear and legitimate interest in conserving and protecting its na-

¹³ See also *County of Washington v. Casella Waste Management, Inc.*, 1990 WL 208709 (N.D.N.Y. Dec. 6, 1990) (stating that local law prohibiting all out-of-county solid waste served a legitimate local purpose in protecting public health and safety as well as the environment, and noting that one of the legitimate effects of the local law might be to extend the useful life of safe landfills); *Bill Kettlewell Excavating, Inc. v. Michigan Dept. of Natural Resources*, 732 F.Supp. 761 (E.D.Mich. 1990), *aff'd*, 931 F.2d 413 (6th Cir. 1991) (holding, in a case brought by the operator of a private commercial landfill which was completely prohibited from landfilling out-of-state waste, that statute requiring county approval for disposal of out-of-county solid waste served legitimate purpose of extending lives of the county's landfills).

tural resources and environment and protecting the health and safety of its citizens. The Cap Provision promotes these interests without discrimination by limiting the amount of waste that can be disposed of at Emelle during any 12-month period. The Cap Provision also furthers Alabama's legitimate interest in controlling health and safety risks by, in effect, regulating the amount of waste being transported on the State's highways and to its landfills.¹⁴

The Court should note that landfilling is the least desirable form of waste disposal as it poses a perpetual threat to the ground and surface waters in the landfill's vicinity and to the surrounding environment. See 42 U.S.C.A. § 6901(b)(7); 6902. The Cap Provision necessarily encourages the development of new technologies to supplement and minimize hazardous waste landfilling, and, as the courts below determined, "furthers the policy

¹⁴ With respect to the dangers involved in the transportation of the wastes involved in this case, the trial court found as follows:

17. In 1989, approximately 40,000 truckloads of wastes were transported over the public highways to the Emelle facility of which approximately 34,000 to 36,000 were from out of state. As in the operation of the facility, transportation of these wastes, no matter how elaborate the precautions, also creates unquantifiable risk or uncertainty to the public health and to the environment.

Some trucks destined for Emelle have been involved in accidents causing hazardous waste to be spilled or released into the environment. Additionally, several incidents of releases of hazardous wastes and noxious fumes have already occurred at the facility. These risks are increased by the increasing volumes. The hazardous wastes landfilled at the Emelle facility are inherently dangerous in their transportation and movement into or from one place to another throughout the State of Alabama. That movement into and through the State of Alabama carries the potential and risk of spills, accidents and explosions that could release toxic fumes and contaminate the groundwater and/or surface water. The increasing volumes have increased the risks and liability involved in that transportation.

Pet. App. 62a.

that future growth in the amounts of such waste to be disposed of must be accompanied by growth in the development and use" of safer alternatives. Pet. App. 28a.

Petitioner's argument that the Cap discriminates against interstate commerce rests solely on the existence of a provision allowing the State to respond to an emergency or to comply with federal law, and on the fact that most of the tremendous and rapidly increasing volumes of dangerous wastes being buried at Petitioner's landfill, concern over which prompted the Cap, are wastes brought into the State from elsewhere. There is no basis for Petitioner's contention that an otherwise valid, evenhanded regulation must be considered discriminatory simply because the regulation provides for some flexibility in response to an emergency situation. Nor is there any basis for Petitioner's contention that an evenhanded legislative response to a problem must be found to discriminate against interstate commerce simply because the largest contribution to the problem originates outside the State. The courts below correctly followed this Court's decision in *Pike v. Bruce Church, Inc.* Accordingly, there is no reason for this Court to review the decision below on this issue.

CONCLUSION

Twenty-two states totally ban the commercial landfilling of hazardous wastes. These "de facto" bans result from these states having simply refused to issue a permit for any landfill facility. Alabama, on the other hand, was receiving such large and rapidly increasing volumes of waste that by 1989, it was receiving 17% of the hazardous wastes generated throughout the country for landfilling. The present and ever increasing risk to the health, safety and environment of Alabama justify the economic disincentive measures and Cap Provision measure employed by Alabama to deal with the substantial risks inherent in such large quantities of hazardous waste.

The Commerce Clause does not elevate free trade above all other values. This Court should not establish, as urged

by Petitioner, a rule of constitutional law that if a state permits the disposal within its state of its own noxious items which threaten public health, safety and the environment, then the state must also accept and allow disposal within the state of unlimited volumes of noxious items from all other states, regardless of the increased risk thereby created to the health and safety of the citizens of the state and to the environment.

The Base Fee and the tonnage restrictions in the Cap Provision apply evenhandedly to in-state and out-of-state wastes in order to effectuate a legitimate local interest.

The issues raised by Petitioner in the action below and in this Court give rise to matters that should be addressed at the national level by Congress. Such issues should not be dealt with in a piecemeal manner by the courts.

There being no conflict between the Alabama Supreme Court's decision and the precedents of this Court, there is no need for this Court to devote its resources to the issues Petitioner desires to have presented in this case.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 91-471

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC.,
Petitioner,

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA;
ALABAMA DEPARTMENT OF REVENUE;
AND JAMES M. SIZEMORE, JR., COMMISSIONER
OF THE ALABAMA DEPARTMENT OF REVENUE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE RESPONDENT GUY HUNT
IN OPPOSITION

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QUESTIONS PRESENTED

1. Where the health and safety of Alabama's citizens, and its environment, are placed at risk by the landfilling of hazardous waste at Petitioner's commercial facility (which receives 85% to 90% of its hazardous waste from out-of-state), does the Commerce Clause prohibit Alabama from limiting the health, safety and environmental risks by imposing a \$72 per ton fee upon such imported hazardous waste.

2. Does a \$25.60 per ton levy imposed evenhandedly on the commercial landfilling of in-state and out-of-state hazardous waste violate the Commerce Clause simply because the levy does not apply to non-commercial disposal of hazardous waste, and because Petitioner's commercial activity most often involves out-of-state hazardous waste.

3. Does the Cap Provision, which limits growth in the annual volumes of landfilled hazardous waste and applies evenhandedly regardless of the origin of waste, violate the Commerce Clause.

RULE 29.1 STATEMENT

All parties to this case in the court below are listed in the caption.

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IN OPPOSITION

STATEMENT OF THE CASE

**A. The Landfilling Of Hazardous Waste Is Not A "Safe"
Disposal Of That Waste.**

Contrary to the repeated assertions of Petitioner CWM,¹ the permanent landfilling of a significant portion of the nation's hazardous waste at the Emelle facility is not a "safe" disposal of that waste. The trial court found that:

¹ CWM asserts: "The facility plays a critical role in the *safe* disposal of the Nation's hazardous waste... [T]he regulations promulgated by the Environmental Protection Agency ("EPA") ... impose elaborate requirements for the *safe* handling and disposal of hazardous waste." Pet. 2

1. Hazardous waste landfilled at Emelle includes "substances that are inherently dangerous to human health and safety and to the environment" and consists of "ignitable, corrosive, toxic and reactive wastes which contain poisonous and cancer causing chemicals and which can cause birth defects, genetic damage, blindness, crippling and death." Pet. App. 11a;

2. Among the chemicals buried at Emelle are arsenic, mercury, lead, chromium and cyanide. Pet. App. 59a;

3. "Should a sudden or non-sudden discharge or release occur, hazardous wastes could pollute the environment, contaminate drinking water supplies, contaminate the ground water, and enter the food chain." Pet. App. 59a (emphasis added);

4. Despite treatment, many of the substances at Emelle will remain hazardous forever. Pet. App. 11a;

5. Landfilling of hazardous wastes produces a poisonous leachate. Pet. App. 11a;

6. It is inevitable that leachate will leak from closed trenches and spread into the underlying chalk formations; in fact, "it appears that leakage has already occurred with respect to at least some of the closed trenches." Pet. App. 11a-14a (emphasis added);

7. Preventing leakage of leachate is beyond present technology. *Id.*;

8. Monitoring wells have been installed at Emelle to attempt to monitor the spread of leachate, and "[p]eriodic checks of those monitoring wells will be required forever." Pet. App. 14a (emphasis added);

(emphasis added). "The Emelle facility plays a crucial role in the safe disposal of the Nation's hazardous waste. . . . Act. No. 90-326 thwarts the important public goal of *safely* disposing of this waste." *Id.* at 29 & 30 (emphasis added).

9. There is uncertainty whether the monitors will detect contamination. *Id.*;

10. Deposits at current hazardous waste landfilling sites may later have to be dug up and removed. GAO report at 20 (emphasis added). See *infra* pages 3 & 4;

11. In 1989, 40,000 truckloads of wastes were transported over Alabama highways to Emelle with 34,000 to 36,000 from out-of-state. *Id.*;

12. "As in operation of the facility, transportation . . . no matter how elaborate the precautions, also creates unquantifiable risk or uncertainty to public health and the environment." Pet. App. 62a (emphasis added); and

13. "Some of the trucks destined for Emelle have been involved in accidents causing spillage or release of hazardous waste into the environment; several incidents of releases of hazardous wastes and noxious fumes have already occurred at the facility; and these risks are increased by the increasing volumes." Pet. App. 15a (emphasis added).

CWM incorrectly argues that disposal of hazardous waste at Emelle is "safe" because it is landfilled in accordance with current EPA regulations.² Aside from the specific findings in this case, the deficiencies of these EPA regulations and the ongoing dangers of land disposal of hazardous waste were dramatized by the General Accounting Office's (GAO) findings issued in its June 1990 report to Congress.³ GAO determined that "land disposal of these [hazardous] wastes presents a significant threat to human health and the environment," and "the magnitude of post-closure liabilities that could be incurred simply cannot be measured at this time." *Id.* at 8.

²Pet. 4.

³GAO/RCED-90-64, "HAZARDOUS WASTE, Funding of Postclosure Liabilities Remains Uncertain" (June 1990) (Def. Ex. 4).

The report concluded that there is no assurance the current regulations are sufficient in the long term to contain hazardous waste landfilled in disposal facilities, such as Emelle. "[F]or the long-term — beyond 30 years — there are questions about the effectiveness of EPA's current requirements . . . EPA is concerned about the effectiveness of its standards for the long-term prevention of waste migration and the potential for postclosure liabilities." *Id.* at 15. EPA's Science Advisory Board "determined that it is difficult to predict that improved land disposal will be protective of human health and the environment for the long-term." *Id.* at 24. EPA "concluded that there is a need to evaluate and understand the long-term performance of what are now considered environmentally sound land disposal practices to ensure that these practices are environmentally sound for many decades." *Id.*

The following extract from that 1990 GAO report underscores the leakage problem already found to exist at the Emelle facility, as well as the seriousness of the long-term problems:

University researchers we talked with also said that problems may exist with a long-term effectiveness of current waste containment technology. *One researcher said that there is little doubt that current hazardous waste facilities will leak.* He said that present research shows that *these systems will fail at some point, particularly after post-closure care ends, and that he views today's disposal of hazardous waste as merely a storage mechanism for hazardous waste that may have to be removed eventually.* Another university researcher told us that the technology used today is the best available but that it is simply unknown if it will keep wastes in place.

Id. at 20 (emphasis added).⁴

⁴The findings of fact in this case and the 1990 GAO report refute CWM's continued reliance (Pet. 4) on the 1989 decision of *Alabama v. United States Environmental Protection Agency*, opining that "[t]o the extent these federal regulations can and do provide for the safe treatment and disposal of toxic waste,

The possibility of having to remove the millions of tons of hazardous waste already buried at the Emelle facility is staggering⁵ in and of itself. The further unabated build-up advocated by CWM is unthinkable.

Guided only by its profit motive, CWM is creating perpetual health and environmental risks and costs to Alabama for monitoring, maintenance, and eventual clean-up and/or removal.

B. Alabama Must Bear The Risks Of Hazardous Waste Leakage.

A poisonous leachate, formed when seeping rainwater mixes with the buried hazardous waste, is already leaking from at least some of the Emelle disposal trenches. Pet. App. 11a. According to EPA, preventing leakage of leachate is "beyond the current technical state of the art." *Id.* It is impossible to prevent rainwater from seeping into open or closed hazardous waste trenches. CWM presently pumps **10 million to 15 million gallons** a year of leachate from the trenches at Emelle. The cost of gathering, storing and transporting the leachate from Emelle costs **\$2 million to \$3 million** per year. Pet. App. 12a.

Leakage of leachate from the Emelle trenches occurs in two ways. Leachate can leak downward from the trench into the Selma chalk. *Id.* The second, more serious, concern is lateral

CWM's Emelle, Alabama, facility poses no threat to the health and safety of the residents of Emelle or to other Alabama residents." 871 F.2d 1548, 1552-53 (11th Cir.) *cert. denied*, 110 S. Ct. 538 (1989) (emphasis added). Those previously lulling words now hold little meaning.

CWM's argument that permanent landfilling at Emelle is safe because it may meet current regulations is akin to saying the Titanic was unsinkable because that ship met then prevailing state-of-the-art standards.

⁵The Emelle facility is the nation's (and probably the world's) largest commercial hazardous waste land disposal facility, Pet. App. 8a. CWM estimates that the Emelle facility has another **100 years** of operating capacity at greater volumes than those predating Alabama Act No. 90-326. *Id.* at 10a.

migration of leachate close to the surface of the trenches. Emelle is located in a drainage basin of the Tombigbee River, which is a major source of fresh water to the State of Alabama. Leachate can flow laterally down the natural drainage gradient into the tributaries of the Tombigbee. Pet. App. 13a. Further, the Selma chalk has unmapped faults and fractures that can accelerate the leakage of leachate. *Id.* at 13a-14a.

Adding to the risk is Emelle's being in an earthquake zone. "[A]n earthquake could unseal cracks in the chinks and open avenues for the movement of leachate and hazardous wastes." Pet. App. 14a.⁶

The leakage or migration of leachate from the hazardous wastes buried at Emelle is monitored by installing and maintaining monitoring wells. CWM estimates of annual monitoring costs of Emelle range from between \$100,000 and \$200,000 to in excess of \$1½ million. Pet. App. 14a. Obviously, the wells cannot monitor all locations, so leakage may go undetected. Also, installing the wells themselves can cause leakage and migration. Pet. App. 14a.

Thirty years after closure Alabama will have the financial burden of maintaining these expensive monitoring systems in *perpetuity*. The trial court found:

... Although it will be necessary to monitor, regulate, maintain (including the pumping, collection, storage, transportation and disposal of leachate from the trenches), and secure the facility forever, CWM has made no provision for the payment of such costs beyond a period of 30 years after closure. Additionally, there has been no

⁶A little over one hundred years ago (1886), an earthquake in the area caused a one-half foot movement in the ground surface. Pet. App. 14a. While a period of one hundred years may be long in human time, it is a particularly short period in geologic time. Given that the wastes buried at Emelle will remain hazardous forever, at some point the recurrence of an earthquake is very likely, and thus, so is the risk of some release of hazardous waste and leachate into the surrounding area and river system.

provision for the payment of any abatement, corrective, or remediation costs, compliance monitoring, third-party damages or natural resource damage.

... Whenever CWM's planned or unplanned cessation of activities at Emelle occurs, there will be substantial financial and environmental risks to the people, businesses, and corporations of Alabama.

Pet. App. 15a.

C. There Are Many Other Potential Sites For Hazardous Waste Landfills.

CWM attempts to create the mistaken impression that the Alabama facility is essential for disposal of hazardous waste. However, it has been determined that hazardous waste landfills can be designed to operate in practically every state of the Union. In fact, in a 1973 study EPA identified 74 potential sites for hazardous waste landfill facilities throughout the country, of which Emelle was one. Def. Ex. 41, p. 72. The Emelle facility was quietly opened thereafter in 1977 and was acquired by CWM in 1978. R.T. 4; Def. Ex. 40, p. 2. Since that time there has developed a much greater appreciation of the still not completely known dangers of hazardous waste landfills. With that increasing awareness, "[e]fforts to obtain permits for new sites in other states are resisted by citizens of those states." Pet. App. 9a. New sites have simply not been developed. In fact, since the 1980 effective date of RCRA, only one additional hazardous waste landfill has been permitted. However, it was never placed in operation and currently is for sale. (That facility is located in a town appropriately named "Last Chance, Colorado.") *Id.*

SUMMARY OF ARGUMENT

Under the detailed factual findings in this case, the opinion of the Supreme Court of Alabama does not conflict with deci-

sions of this Court or the federal courts of appeal. The writ should be denied.

With respect to the Additional Fee, the court below correctly applied this Court's decision in *Maine v. Taylor*, 477 U.S. 131 (1986), to the findings of fact of a real threat to safety and the environment in Alabama. Contrary to the assertions of CWM, permanent landfilling of these huge volumes of hazardous waste is not safe. Given the safety and financial risks to Alabama that will continue in perpetuity, the Additional Fee is a legitimate measure to protect public safety, health and the environment, and is not simple economic protectionism.

As to the Base Fee and the Cap Provision, the courts below correctly applied the *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), balancing test. The Base Fee is evenhanded, applying to both in-state and out-of-state hazardous waste commercially landfilled. Only 1.6% of in-state RCRA hazardous waste is landfilled in Alabama at a site other than Emelle, so 98.4% of those landfilled Alabama wastes are subject to the Base Fee. Accordingly, the Base Fee provision neither discriminates on its face nor in its practical effect. Moreover, the consensus of reported decisions is that commercial hazardous waste facilities pose much greater dangers than non-commercial facilities. The greater risk is a legitimate reason for taxing only commercial facilities.

The Cap provision is an evenhanded measure to slow, but not stop, the amount of hazardous waste commercially landfilled in Alabama. The trial court held, based on the evidence presented, that any burden the Cap might place on interstate commerce is speculative, and the provision does not create a burden on interstate commerce. This Court, and other courts, have held a state may evenhandedly reduce the volumes of wastes accepted for disposal. This decision below is in accord with those precedents.

Under the facts here there is no conflict in decisions that would warrant issuance of the writ.

ARGUMENT

The decision below correctly applies the principles and/or tests announced in *Maine v. Taylor*, *supra*, and *Pike v. Bruce Church*, *supra*, to the specific trial court findings of actual threats to Alabama's environment. The petition for writ of certiorari should be denied.

I. The Additional Fee Is Permissible Under These Facts.

A. The Supreme Court Of Alabama Correctly Held That The Additional Fee Is Constitutional.

The dormant commerce clause theory has been asserted to prevent states from engaging in purposeful economic protectionism. However, the Constitutional framers reserved to the States their historic police power to protect the safety and welfare of their citizenry. Accordingly, the Commerce Clause was not intended to, and does not, invalidate all state restrictions on commerce. "It has long been recognized that 'in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.'" *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 669 (1981).

More recently, in *New Energy Co. v. Limbach*, 486 U.S. 269 (1988), this Court stated:

... [A] State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. See, e.g., *Maine v. Taylor*, 477 U.S. at 138, 151 ...; *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. at 958; *Hughes v. Oklahoma*, 441 U.S. at 336-337, ...; *Dean Milk Co. v. Madison*, 340 U.S. at 354

Id. at 278.

This Court then held that a commerce clause analysis must go beyond the face of the statute to its substance. "[W]hat may appear to be a 'discriminatory' provision in the constitutionally prohibited sense — that is, a protectionist enactment — may on closer analysis not be so." *Id.*

Such an analysis was used in *Maine v. Taylor*, where this Court upheld Maine's facially discriminatory statute. Maine's total ban on out-of-state baitfish was upheld because the record showed the purpose of the measure was to protect the environmental interests of the State and was not to protect its economic interests — though certainly the effect of the decision impacted Maine's economic interests. The district court found imported baitfish posed a risk to Maine's environment (to the survival of domestic fish) and there was insufficient technology to give Maine a nondiscriminatory alternative. Based upon the findings of fact, this Court stated:

Moreover, we agree with the District Court that *Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible. "[T]he constitutional principles underlying the Commerce Clause cannot be read as requiring the State of Maine to sit idly by and wait until potentially irreversible environmental damage has occurred...."*

477 U.S. at 148 (emphasis added).

This Court concluded:

The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. As long as a State does not needlessly obstruct interstate trade or attempt to "place itself in a position of economic isolation," ... it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources. The evidence in this case amply supports the District

Court's findings that Maine's ban on the importation of live baitfish serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives. This is not a case of arbitrary discrimination against interstate commerce; the record suggests that Maine has legitimate reasons, "apart from their origin, to treat [out-of-state baitfish] differently"⁷

477 U.S. at 151-52.

The decision in *Maine v. Taylor*, then, makes a distinction between state measures which discriminate arbitrarily against out-of-state commerce and attempt to place in-state interests in a position of commercial advantage, i.e., "simple economic protectionism," and state measures which seek to protect public health, safety, or the environment. The decision was based upon the historic police power of states to protect public safety and health.⁸ "This distinction between the power of the State to shelter its people from menaces to their health or safety . . . , even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law." *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 533 (1949).

⁷As held by the Alabama Supreme Court (Pet. App. 45a-46a):

To tax Alabama-generated hazardous waste at the same rate as out-of-state waste is not an available non-discriminatory alternative, because Alabama is bearing a grossly disproportionate share of the burdens of hazardous waste disposal for the entire country. Here, the statute that creates the Additional Fee does not needlessly obstruct interstate trade, nor does it constitute economic protectionism. It is a responsible exercise by the State of Alabama of its broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.

⁸It also follows in the tradition of the "quarantine cases." See *Bowman v. Chicago & Northwestern R.*, 125 U.S. 465 (1888); *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935); *Sligh v. Kirkwood*, 237 U.S. 52 (1915); *Asbell v. Kansas*, 209 U.S. 251 (1908); *Railroad Co. v. Husen*, 95 U.S. 465 (1878).

CWM wrongfully accuses Alabama of "in effect erect[ing] an 'interstate waste keep out' sign at the Emelle facility, and reserv[ing] CWM's waste disposal capacity solely for Alabamians" Pet. 10. Alabama has **not** chosen to ban importation of hazardous waste and is **not** reserving the space solely for Alabama use. Those who want to burden Alabama with the health, environmental, and financial risks of the commercial landfilling of their hazardous wastes are allowed to do so for an additional fee.⁹

As GAO noted, "the magnitude of post-closure liabilities that could be incurred simply cannot be measured at this time." GAO report at 8. A risk management and insurance expert, Bernard Webb, testified clean-up costs at Emelle could likely be measured in the billions of dollars. Deposition of Bernard Webb at 48; R.T. 574.¹⁰

The State is bearing a disproportionate share of the nation's hazardous waste problem, and the Additional Fee addresses the equities of Alabama's bearing this burden. Almost 90% of the 788,000 tons of hazardous waste landfilled at Emelle in 1989 were from out-of-state. The volume landfilled at Emelle in 1989 was 231% over that landfilled four years earlier in 1985 (788,000 tons in 1989 compared with 341,000 tons in 1985). Pet. App. 9a. An equal tax on in-state and out-of-state waste would not fairly and adequately compensate Alabama for the risk of hazardous waste landfilling it must bear. Out-of-

⁹The state's rationale for imposing the fee is not undermined by virtue of the absence of an environmental clean-up fund, as argued by CWM. See *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707, 720 (1972); *New Hampshire Motor Transport Ass'n v. Flynn*, 751 F.2d 43, 49 (1st Cir. 1984) ("The Commerce Clause does not require states or courts to trace individual dollars. . . [I]t may pay some costs . . . out of a special fund, while paying other costs out of general revenues. It may finance its expenditures out of general revenues, special taxes, fees, grants, or in other ways.").

¹⁰Mr. Webb testified that if insurance was available to insure against these contingencies, which it is not, he would recommend one *billion* dollars in coverage. He estimated the annual premium for such a policy would range from \$100-\$150 million. Webb dep. at 82, 92.

state generators may pay a higher fee now, but Alabama will bear in perpetuity the health and environmental risks and the financial responsibility for monitoring, maintenance and ultimate clean-up of the Emelle facility. The state must act now or risk being unable to obtain any meaningful contribution from out-of-state interests. As explained by the Alabama Supreme Court, "The Alabama legislature [did not] ban[] the collection and acceptance of hazardous waste; it . . . merely ask[ed] the states that are using Alabama as a dumping ground . . . to bear some of the costs for the increased risk they bring to the environment . . . [that] will continue in perpetuity." Pet. App. 44a.

B. The Cases Relied Upon By Petitioner Do Not Support Issuance Of The Writ.

The petitioner incorrectly asserts that the decision below conflicts with this Court's decision in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). However, safety was not an issue in the majority opinion in *City of Philadelphia* (which only involved ordinary solid waste or household garbage and not hazardous waste). Because the statute "[o]n its face . . . impose[d] on out-of-state commercial interests the full burden of conserving the State's remaining landfill space," 437 U.S. at 628, the majority concluded New Jersey's claim of environmental protection was a pretext for economic protectionism, i.e., reserving the landfill exclusively for New Jersey residents. The basis of invalidation of the statute was hoarding of in-state resources and economic protectionism.

The record here is quite different. The findings of fact by both the trial and appellate courts, with their attendant presumption of correctness on this appeal, establish that landfilling of **hazardous** waste is unsafe. The disposal trenches will leak and there is no way to stop it. Some leakage has already begun at Emelle. EPA has recognized its own regulations for landfilling hazardous waste provide no assurance of long-term safety, with that and attendant problems elaborated upon in

the June 1990 GAO report.¹¹ The specter was even raised that deposits at current hazardous waste landfilling sites themselves may later have to be dug up and removed. GAO report at 20 (see *supra* page 4). Accordingly, safety is directly at issue.

Unlike *City of Philadelphia, Maine v. Taylor* is a safety case. Moreover, the facially discriminatory Maine statute protected the safety of fish and aquatic life. The Alabama act protects the safety of human life and health. The facts of the instant hazardous waste case are more closely analogous to *Maine v. Taylor* than to *City of Philadelphia*. Accordingly, there is no conflict with the latter decision.

Nor is this instant case in conflict with the four federal court of appeals decisions cited by CWM. Pet. 15-16. *Washington State Building & Construction Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982) concerned a total ban of out-of-state low level radioactive waste; *Illinois v. General Electric Co.*, 683 F.2d 206 (7th Cir. 1982) involved a total ban of out-of-state spent nuclear fuel; *Hardage v. Atkins*, 582 F.2d 1264 (10th Cir. 1978) banned out-of-state hazardous waste unless the importing state had a statute in the nature of a reciprocity provision; and a selective ban of hazardous waste was the issue in *National Solid Wastes Management Ass'n v. Alabama Dep't of Environmental Management*, 910 F.2d 713 (11th Cir. 1990), *modified*, 924 F.2d 1001, *cert. denied*, 111 S. Ct. 2800 (1991) ("NSWMA"). The statute here does not involve a ban of out-of-state waste as did those cases. Also, except for NSWMA, those cases predate the *Maine v. Taylor* decision and the very significant and critical June 1990 GAO report.¹²

¹¹ The actual experience at Emelle is consistent with the concerns expressed in the GAO report. The leachate leakage already occurring at Emelle documents GAO's concerns about the long-term effectiveness of hazardous waste containment procedures.

¹² It should be further noted that the record in NSWMA was completed in 1989. The Eleventh Circuit did not have the benefit of the June 1990 GAO report or the record evidence in this case when it was called upon to decide NSWMA.

Moreover, none of those cases involved the comprehensive and explicit findings of fact found in this case as to the dangers, risks and financial consequences of permanent hazardous waste landfilling. There were no factual findings in those cases as there were here that the long-term safety of the disposal regulations were suspect and the landfill facilities had already showed signs of leakage and inability to contain the hazardous wastes and the resulting poisonous leachate.

Additionally, this case proceeded through a four-day trial where the trial court heard expert testimony from both sides and a full presentation of all the relevant evidence. In NSWMA the Eleventh Circuit did not have the benefit of a trial record and exhaustive evidentiary presentation. The factual record here distinguishes it from the above cases.¹³ This case most assuredly is not one of "commercial rivalr[y] among states," as asserted by CWM. Pet. 10. Accordingly, under the facts of this case there is no conflict with decisions of other courts that would warrant issuance of the writ.

II. The Base Fee Regulates Evenhandedly.

The Base Fee applies equally to interstate and intrastate waste landfilled at commercial hazardous waste facilities. The trial court found "there is only one, relatively small non-commercial hazardous waste landfill facility presently permitted for hazardous waste in Alabama," which "accepts only on-site

¹³ After the filing of the petition, the U.S. Court of Appeals for the Fourth Circuit released its opinion upholding a preliminary injunction against enforcement of a South Carolina law in *Hazardous Waste Treatment Council v. South Carolina*, Slip Op., No. 91-2317 (September 20, 1991). (CWM cited the pending appeal, see Pet. 16 n. 8). Unlike the Alabama Act, the South Carolina law provided a mandatory preference for in-state hazardous waste and imposed a selective ban on out-of-state hazardous waste. Again, as in the other cases cited by CWM, there was no trial and no comprehensive findings of fact regarding the safety of hazardous waste landfilling. In fact, the court expressly declined to reach a decision on the merits because there was inadequate factual development. *Id.* at 26.

generated hazardous waste of approximately 4000 tons a year." Pet. App. 16a. In contrast, the trial court found that 788,000 tons of waste were commercially landfilled at Emelle in 1989, and of that volume, "68,000 to 69,000 tons were generated in-state . . ." *Id.*¹⁴ The landfilling of 4,000 tons per year at Alabama's one non-commercial site hardly compares with the scope of CWM's landfilling operations at Emelle.

Significantly, the trial court made a finding of fact that non-commercial facilities in Alabama were *not* comparable to commercial hazardous waste facilities:

... Non-commercial hazardous waste facilities are not comparable to commercial hazardous waste facilities. Commercial facilities are likely to involve the transportation of wastes from off-site locations, and the accumulation and disposal of relatively large quantities of hazardous wastes; most non-commercial facilities dispose of waste on-site, and generally do not involve transportation. The amounts generated and disposed of at non-commercial facilities are far smaller than amounts disposed of at commercial facilities. Accordingly, the public health and safety risks associated with commercial hazardous waste facilities are much greater than those associated with non-commercial facilities.

....

... Should additional commercial hazardous waste landfills be permitted in Alabama, and meet the

¹⁴Thus, the important distinction under the Base Fee is between facilities which dispose of hazardous waste for a fee and those which do not. For instance, RCRA (42 U.S.C. §§ 6922 & 6924) distinguishes between hazardous waste commercially landfilled and that disposed of on-site by the generator. Hazardous waste commercially landfilled is subject to rigorous manifest systems, restrictions on landfilling, caps on the amounts and concentrations of wastes accepted and monitoring. The distinction under federal law lies in the recognition that commercial facilities pose far greater danger because of the much larger volumes.

statutory criteria, the provisions of Act 90-326 would apply to them just as they apply now to CWM.

Pet. App. 16a-17a.¹⁵

The trial court concluded "the legislature's treatment of commercial hazardous waste facilities differently from non-commercial facilities is rationally related to legitimate state interests." Pet. App. 23a.¹⁶ *Cf. Cecos International, Inc. v. Jorling*, 895 F.2d 66, 73 (2d Cir. 1990) (Upholding statute distinguishing commercial from non-commercial hazardous waste facilities against equal protection challenge: "The state provided cogent reasons for requiring siting board approval for expansion of commercial — but not non-commercial — hazardous waste facilities, all of which were found to be legitimate by the district court.").¹⁷

Because the Base Fee of \$25.60 per ton does not discriminate and applies equally to out-of-state and in-state hazardous waste landfilled for a fee, the strict scrutiny test is inapplicable. The courts below correctly determined that the Base Fee was in ac-

¹⁵The court also found that some of the non-commercial facilities that had accepted on-site generated waste were "no longer in operation." *Id.*

¹⁶The trial court found:

[T]he use of commercial disposal sites poses unique health and safety risks . . . and the accumulation in one place of extremely large volumes of different types of waste. The number of trucks delivering hazardous waste to the Emelle facility alone was approximately 40,000 during 1989, and was expected to increase in subsequent years. . . . Moreover, commercial landfill facilities comprise the bulk of the hazardous waste accumulation problem.

Id. at 23a-24a.

¹⁷The court found the risks of commercial hazardous waste facilities were greater because commercial facilities "are more likely to expand because [of] their profits . . . whereas non-commercial facilities, sited on the premises of the waste generator, lack a profit motive," and "hazardous waste must be transported to the off-site commercial facility." *Id.* at 73. The court found siting board approval was warranted for commercial facilities "to prevent a particular area of the state from housing too many commercial facilities, thereby receiving a *disproportionately large share* of the state's hazardous wastes." *Id.* (emphasis added).

cord with the balancing test of *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) and *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

"It is well-settled that states' regulatory powers are greatest when they address traditional matters of local concern such as environmental and natural resource regulation. *Kassel v. Consolidated Freightways*, 450 U.S. 662 (1981)." Pet. App. 18a. State legislative measures that are enacted to promote public health and safety are accorded particular deference. *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978). Challenges to state public safety regulations must overcome a "strong presumption of their validity," *id.* at 444; and courts will not second-guess legislative judgments in comparison with the burdens on interstate commerce, *Kassel*, 450 U.S. at 670. States retain broad authority under their general police powers to regulate matters of legitimate local concern even though interstate commerce is affected. *Maine v. Taylor*, 477 U.S. at 138.

The Supreme Court of Alabama applied the *Pike v. Bruce Church* balancing test to the Base Fee. Relying upon the trial court's finding that "CWM has failed to established that the Base Fee has discriminatory effects on interstate commerce," the court found any "burden the Base Fee imposes on interstate commerce is not clearly excessive in relation to the benefits it produces." Pet. App. 20a. The Base Fee benefits the state by compensating it for "the financial responsibilities and risks it bears on account of commercial hazardous waste disposal activities." *Id.* Comparing the safety, environmental and financial risks of hazardous waste landfilling to Alabama with the "alleged burden on interstate commerce establishes that any such burden is not clearly excessive." *Id.* As this Court has stated, even if the burden of a state regulation falls most often on out-of-state companies, this burden "does not, by itself, establish a claim of discrimination against interstate commerce." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987).

CWM wrongly argues that Alabama has "gerrymandered" the Base Fee. Pet. 22. When CWM states that "most of the Alabama-generated hazardous wastes" are not disposed of at Emelle (Pet. 18), it includes large quantities of less dangerous

waste water which is either treated or stored in surface containments, but which is *not* landfilled. CWM omits the critical fact that 98.4% of Alabama's landfilled hazardous waste is in fact landfilled at Emelle. Def. Ex. 26, p. 45 & Def. Ex. 27, p. 35.¹⁸ Since only 1.6% of Alabama-generated landfilled hazardous wastes are landfilled elsewhere than at the Emelle facility, Alabama has *not* "carved out a substantial exemption from the tax that, as a practical matter, is available only to Alabama generated waste." Pet. 18.

CWM, in attacking the neutral Base Fee, is in essence asserting that the State of Alabama can do nothing to reduce the disproportionate, permanent commercial landfilling of enormous hazardous waste volumes in the state, and the transference to Alabama of all the attendant ills. The Constitutional framers did not intend, and this Court has never held, that private commercial interests are omnipotent or that a state is powerless to reasonably protect the safety of its people and environment. In fact, in *City of Philadelphia*, this Court stated: "And it may be assumed as well that New Jersey may pursue those ends [reducing waste disposal costs and saving open lands from pollution] by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected." 437 U.S. at 626. As opined here by the trial court, "[I]n view of the financial, safety, environmental and other objectives of [the] Act . . . and the fact that the Base Fee falls evenhandedly on interstate and intrastate waste, it is difficult to imagine how these objectives could be accomplished in ways that have a lessor impact on interstate activities." Pet. App. 20a.

¹⁸In 1987, 313,118 tons of RCRA hazardous waste were landfilled at Emelle. The total of all RCRA hazardous waste landfilled in Alabama that year, including that landfilled at Emelle and that landfilled at other sites in Alabama, was 318,304 tons. Subtracting the amount landfilled at Emelle (313,118 tons) from the total landfilled in the state that year (318,304 tons) shows that only 5,186 tons were landfilled in the state somewhere other than Emelle. Therefore, 98.4% was landfilled at Emelle and only 1.6% was landfilled at non-commercial Alabama sites. See Def. Ex. 26 & 27, *supra*.

The decision of the court below is in accord with the decisions of this Court and other federal courts of appeal. The writ should not issue on the Base Fee.

III. The Cap Provision Applies Evenhandedly.

The Cap Provision applies equally to in-state and out-of-state waste. Therefore, the courts below correctly applied the *Pike v. Bruce Church* balancing test. Like the Base Fee, the Cap Provision regulates evenhandedly in furtherance of a legitimate state interest. The Cap Provision furthers Alabama's legitimate interest in controlling health and safety risks by regulating the volume of hazardous waste landfilled and transported on the highways in any one year.¹⁹ The trial court, after hearing the evidence, found that "any burden the Cap provision might place on interstate commerce is speculative." Pet. App. 27a. The Cap "limits the amount of waste landfilled during the . . . benchmark period" and "[t]hus, the Cap creates no discriminating burden on existing levels of commerce or on existing rates of waste generation and landfilling." *Id.*²⁰

¹⁹Sue Robertson, Chief of the Alabama Department of Environmental Management's Land Division, testified as to the difficulties from the almost 50% increase of hazardous waste tonnage at Emelle in 1989 over 1988. R.T. 310. Receiving the 40,000 truckloads in 1989 caused tremendous difficulties. The trucks were coming into the facility around the clock and were backed-up out the gate. The large volumes impeded ADEM in its regulatory functions. *Id.*

²⁰CWM at page 29 of the petition makes unsubstantiated assertions attributing solely to Act No. 90-326 a decline in the volume of hazardous waste received at Emelle since 1989. In a *Wall Street Journal* article of March 21, 1991, p. A4, the following explanation was offered by CWM as the primary reason for the decline:

The recession has forced many manufacturers to close plants or cut production, thus reducing shipments of hazardous chemicals to Chemical Waste facilities. This accounts for about 70% of the expected 15% to 20% drop in first-quarter revenue — excluding acquisitions — which [Chemical Waste Management, Inc.] disclosed late Tuesday. [emphasis added].

Other courts have recognized restrictions on the importation of wastes. In *Diamond Waste, Inc. v. Monroe County Georgia*, 939 F.2d 941 (11th Cir. 1991), the court stated a county may impose daily tonnage restrictions or other restrictions.²¹ In *Al Turi Landfill, Inc. v. Town of Goshen*, 556 F. Supp. 231 (S.D.N.Y. 1982), an ordinance was upheld that limited both the amount of land that could be used for solid waste landfilling as well as the size of individual facilities. The court explained that the municipality had a legitimate interest in limiting the volumes of waste.²² Moreover, this Court stated, "... New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected." *City of Philadelphia*, 437 U.S. at 626.

CWM misstates to this Court that the Cap provision has an exception that "is available only for Alabama waste." Pet. 8 & 28. The actual wording and effect of Act No. 90-326 is quite different. Amounts in addition to the Cap may be landfilled if "necessary to protect human health or the environment in the state, or to allow the state to comply with its obligations to assure disposal capacity pursuant to applicable state or federal law" Pet. App. 55a. Alabama has entered into regional

²¹The court stated: "... Monroe County could reduce the amount of garbage deposited by setting reasonable daily tonnage limits on imported waste and granting permission to dump on a 'first come, first served' basis. Or Monroe County could auction permits for dumping fixed amounts of imported waste. Or dumping rights for out-of-county garbage could be established by lottery. . . . [T]his is not an exhaustive list of alternatives available." 939 F.2d at 945.

²²The court stated:

[T]he DEC decision itself indicates that even a safe landfill is not problem free. Notwithstanding its state-of-the-art design, the . . . Landfill can be expected to produce some amount of leachate . . . which frequently pollutes ground and surface waters. . . . [T]he proposed landfill could have an impact on the groundwater between the boundary of the Landfill and Wallkill River.

Id. at 238.

agreements with other states to meet the 20-year capacity disposal requirements of SARA.²³ Under these agreements, other states have contracted to provide capacity for categories of Alabama's hazardous waste and Alabama has agreed to provide capacity for quantities of those states's hazardous waste. Should CWM exhaust the allowable disposal volume in any year through its contracts, then Alabama may have to employ the exception provision to provide for disposal of out-of-state waste it guaranteed in the regional agreements required under SARA. Given the relatively small quantities of Alabama-generated hazardous waste landfilled at Emelle, it is more probable the exception, if ever invoked, will involve out-of-state waste and not in-state waste.

Also, the provision allowing increased volumes under certain conditions is a rational safety valve. Allowing increased volumes to "protect human health or the environment in the state, or to allow the State to comply with its obligations to assure disposal capacity pursuant to applicable state or federal law," is a reasonable and farsighted provision. An increased volume "is warranted [only] in accord with safety or to comply with State or federal regulations." *Id.* at 27a. It is obviously not a subversive attempt to reserve additional capacity for intrastate use as contended by CWM.

The Cap Provision is neutral and applies evenly to interstate and intrastate waste. The decision below is in accord with decisions of this Court and the writ should not issue.

CONCLUSION

The controlling precedent on the Additional Fee is this Court's decision in *Maine v. Taylor*. The controlling test on the Base Fee and Cap Provision is contained in *Pike v. Bruce Church*. The Supreme Court of Alabama has correctly applied

²³The Superfund Amendments and Reauthorization Act (SARA), 42 U.S.C. § 9604(c)(9).

the principles of those cases to the findings of fact showing actual threats to the health and safety of Alabama's citizens as well as to its environment. Under the facts of this case there is no conflict with decisions that would warrant issuance of the writ.

A state has a primary duty to provide for the safety of its citizens and environment. As evidenced by the detailed factual findings, Alabama was forced to act. However, Alabama properly balanced the safety of its citizens and the need for cooperation with other states. Importers may bring hazardous waste into the state and permanently landfill it. However, they must (and they should) pay an additional fee for the disproportionate risks these tremendous volumes of hazardous waste create. Further, the Base Fee and Cap Provision are evenhanded and appropriate.

The petition in this case should be denied.

October 1991

Respectfully submitted,

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OCT 25 1991

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC., PETITIONER

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA;
ALABAMA DEPARTMENT OF REVENUE; AND
JAMES M. SIZEMORE, JR., COMMISSIONER OF THE
ALABAMA DEPARTMENT OF REVENUE, RESPONDENTS

On Petition for a Writ of Certiorari to the
Supreme Court of Alabama

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

We showed in our certiorari petition that the Alabama Supreme Court's decision squarely conflicts with decisions of this Court and other federal and state courts and involves issues of great public importance. The amicus briefs filed by groups representing virtually all American manufacturers (American Iron & Steel Inst., et al. ("AISI")) and the entire waste disposal industry (Hazardous Waste Treatment Council, et al. ("HWTC")) confirm that the legal issue has tremendous practical ramifications and should be addressed now by this Court.

The federal government also has spoken out against state laws that discriminate against interstate commerce in hazardous waste. The Administrator of the Environmental Protection Agency recently stated in testimony before Congress that there is "a need for a national market for specialized treatment and disposal of hazardous waste. Therefore, we should not create any authorities that operate as a ban on interstate transport of either solid or hazardous waste, thereby inhibiting or restricting the development and use of the most appropriate technology for waste treatment or recycling."¹

Respondent Sizemore nonetheless argues (Opp. 6-8) that, notwithstanding the flaws in the decision below and the confusion in the lower courts, this Court should deny certiorari and leave "the nation's waste disposal problems" for resolution by Congress. He appears to suggest that whenever there is a division among the lower courts on a legal issue that relates to "significant political issues of emerging importance," this Court should allow the uncertainty to fester in order to create a situation so intolerable that Congress is forced to act. While it is perhaps understandable that Alabama wishes

¹ Testimony of William K. Reilly before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works at 15 (Sept. 17, 1991). We have lodged with the Clerk of this Court a copy of the Administrator's written statement. (The transcript of the hearing at which he testified has not yet been released.)

to avoid review of the constitutionality of taxes that generated some \$34 million during their first year in operation, this Court's responsibility is to declare "what the law is" in order to ensure the protection of federal rights, not to wait for Congress to act.

In any event, respondents have not cited any evidence that Congress is even considering legislation regarding interstate movement of hazardous waste.² The fact that Congress might someday choose to alter the governing rules provides no basis for leaving CWM—and interstate commerce as a whole (see AISI Am. Br.)—to suffer the burden of these blatantly unconstitutional taxes for the indefinite future.

Less than six months ago, Alabama, supported by a number of states as amici curiae, urged this Court to review the Eleventh Circuit's decision in the *NSWMA* case on the ground that the scope of the states' power to discriminate against out-of-state waste raised "important questions of Federal constitutional law which should be settled by this Court." 90-1718 Pet. 8 (footnote omitted). The Court denied certiorari, presumably because there was then no conflict among the lower courts. Now that the Alabama Supreme Court has created a conflict, the issue is ripe for review by this Court.

A. The Facially Discriminatory \$72 Tax

Alabama's \$72 Additional Fee discriminates on its face against interstate commerce. As we discussed in the pe-

² The bill cited by respondent Sizemore (Opp. 7 n.3) concerns only interstate movements of solid waste, not hazardous waste. Indeed, Senator Chafee, one of the sponsors of the bill, has stated that states should not be permitted to adopt measures that discriminate against interstate commerce in hazardous waste because "[s]uch restrictions * * * are simply bad environmental policy." Cong. Rec. S5283 (daily ed. Apr. 25, 1991).

Moreover, Congress already has addressed the problems cited by Sizemore, adopting a statute that encourages states to authorize construction of additional hazardous waste disposal facilities. 42 U.S.C. § 9604(c)(9); see also *NSWMA*, 910 F.2d at 716-717, 721 (discussing purpose and effect of this provision).

tition (at 11-17), the Alabama Supreme Court's decision upholding that tax conflicts with this Court's decision in *City of Philadelphia* and with decisions of four federal courts of appeals. A fifth federal court of appeals has since held that the Commerce Clause invalidates state laws that facially discriminate against disposal of waste generated in other states. *Hazardous Waste Treatment Council v. South Carolina*, 1991 WL 183687 (4th Cir. Sept. 20, 1991).

Respondent Sizemore contends (Opp. 11-13 & n.5) that there is no conflict, but his distinctions are irrelevant because they have nothing to do with the grounds of the Alabama Supreme Court's ruling. For example, Sizemore intimates (Opp. 11-12) that the constitutional flaw in the statute struck down in *NSWMA* was that it distinguished among interstate waste. But that statute should have been upheld if respondents are correct in their view that states may discriminate against interstate commerce as long as the legislature's motivation is to protect public health. See Pet. 16.

Instead, the Eleventh Circuit squarely rejected Alabama's argument that *Maine v. Taylor* limits *City of Philadelphia* and held the statute unconstitutional because it "does not distinguish on the basis of type of waste or degree of dangerousness, but on the basis of the state of generation." 910 F.2d at 721. Alabama sought certiorari on the ground that the Eleventh Circuit had interpreted *Taylor* too narrowly and *City of Philadelphia* too broadly (see 90-1718 Pet. 12-14, 16-17). Thus, in the State's own view, *NSWMA* would have been decided in the State's favor if the Eleventh Circuit had adopted the legal theory subsequently embraced by the Alabama Supreme Court. The conflict between the two decisions is undeniable.

Respondent Sizemore's attempt to distinguish the Fourth Circuit's recent decision (Opp. 12 n.5) is similarly flawed. That court did not base its decision on the particular nature of the discrimination against interstate commerce,

but on *City of Philadelphia*'s principle that a state may not distinguish among waste based on state of origin alone. 1991 WL 183687 at *9-*10. That is the precise principle found inapplicable by the Alabama Supreme Court.³

Indeed, even respondent Sizemore is forced to concede that the decisions of the Fourth and Eleventh Circuits "may indicate an interpretation of" *City of Philadelphia* and *Taylor* different from that of the Alabama Supreme Court. Opp. 12 n.5; *id.* at 12. This Court should grant certiorari to resolve this clear dispute about the meaning of these two important decisions.

On the merits, respondents' defense of the \$72 tax is insupportable. As we discuss in the petition (at 12-13), respondents' argument is undercut by the plain language of *City of Philadelphia*, language that respondents cannot explain and therefore simply ignore. Certainly respondents' out-of-context quotations from *Taylor* and other cases (Sizemore Opp. 9-10) cannot obscure this Court's repeated affirmation that the strict Commerce Clause standard applicable to facially discriminatory state laws motivated by economic protectionism "also [applies] to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate

³ Respondents' distinctions (Sizemore Opp. 12 n.5; Hunt Opp. 14-15 & n.13) of the other federal court decisions are similarly unpersuasive. The fact that the other decisions did not involve statutes identical to those at issue here is irrelevant because those courts interpreted *City of Philadelphia* in a manner that squarely conflicts with the Alabama Supreme Court's decision in this case. Moreover, the Seventh and Ninth Circuits held the state laws at issue invalid under the Commerce Clause, in addition to being preempted by federal law.

Respondent Hunt places great weight on the fact that the Alabama Supreme Court reached its decision after a trial. But, as we discuss below, the facts developed at trial are wholly irrelevant to the legal issue. Indeed, NSWMA was decided on a summary judgment record that included many of the "facts" now advanced by respondents to justify the Alabama Supreme Court's decision. See 729 F. Supp. at 797-799.

trade." *Taylor*, 477 U.S. at 148 n.19 (citing *City of Philadelphia* as an example of such a case).

Respondents' contention (Sizemore Opp. 13 n.6) that *Taylor* and the "quarantine cases" apply here is similarly mistaken. The Additional Fee is a tax, not a quarantine, and, because the trial court found that there is no difference between Alabama waste and interstate waste, the fee cannot be justified under *Taylor*. See Pet. 14 n.6.

Finally, respondents place great emphasis on the risks from the transportation and disposal of hazardous waste at CWM's Emelle facility that allegedly are established by the factual record in this case. Hunt Opp. 13-14. Even if all of these assertions were true, and they are not,⁴ they are insufficient as a matter of law to justify taxing waste generated in other states at a rate higher than waste generated in Alabama. Respondents cite no evidence—and there is none—to contradict the trial court's finding (Pet. App. 86a) that a ton of non-Alabama waste presents risks no different from a ton of Alabama waste. Thus, while respondents' risks might provide the basis for imposing an evenhanded per-ton tax on disposal of all waste in Alabama, they cannot justify Alabama's blatant facial discrimination against interstate commerce. See Pet. 13-14.⁵

⁴ Respondent Hunt's entire argument rests on the premise that current federal and state regulations are inadequate to protect the public.

⁵ A per-ton tax would take account of the fact that most of the waste disposed of at the Emelle facility is generated in other states: interstate waste would bear the greater share of the tax because there is more of it.

Respondent Hunt asserts (Opp. 13) that Alabama must collect extra funds from out-of-state waste generators now, because it will not be able to reach them in the event that there is a discharge of waste from the Emelle facility sometime in the future. But federal law makes *all* generators liable in perpetuity for the costs of remediating any such discharge. See 42 U.S.C. § 9607(a). The location of the generator's business is irrelevant to this obligation. 42 U.S.C. § 9613(a).

B. The \$25.60 Tax

Respondents do not dispute that discrimination against interstate commerce can be accomplished without a facially discriminatory statute. Nor do they seriously dispute that there is considerable confusion among the lower courts about the standard for deciding when a facially neutral law's practical effect or the motivation for the law's enactment require that the law be treated for Commerce Clause purposes as the equivalent of a facially discriminatory measure. See Pet. 25-27. Respondents instead argue that certiorari should not be granted with respect to this issue because (1) laws that distinguish between "commercial" and "noncommercial" activities can never violate the Commerce Clause, and (2) the record in this case demonstrates that the Base Fee does not discriminate against interstate commerce in its practical effect.

Of course, the Alabama Supreme Court did not rest its decision on either of these grounds. It simply concluded that the Base Fee does not violate the Commerce Clause because it is facially nondiscriminatory. Pet. 23. Respondents make little effort to defend that perfunctory approach. The question, therefore, is whether respondents' arguments make this case an inappropriate vehicle for resolving how courts should go about determining whether facially neutral measures in fact discriminate against interstate commerce.

1. In considering respondents' attempt to elevate the commercial/noncommercial distinction into a constitutional safe harbor, it is important to note that the Base Fee does not tax all businesses and exempt only charitable activities; some businesses are exempt from the tax. Moreover, the Base Fee does not tax all arm's length transactions and exempt all intracorporate dealings. Disposing for pay of a single pound of hazardous waste renders a disposal site wholly "commercial" and makes *all* disposal at that site subject to the tax, regardless of whether the other disposal transactions are com-

mercial or noncommercial. Because disposal facilities located on manufacturing sites are classified as noncommercial and dispose exclusively of Alabama waste (the waste generated by that manufacturing facility), while "commercial" disposal sites dispose of virtually all of the interstate waste disposed of in Alabama, this classification plainly can operate as a proxy to effectuate discrimination against interstate commerce.

Respondents have offered no reason why such a classification should not be evaluated under the standard that applies generally to determine whether a neutral measure discriminates against interstate commerce in effect. This Court's cases instruct that it is the substance of state legislation, not its form, that matters for Commerce Clause purposes. *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 294-296 (1987). Where *any* statutory classification may serve as a proxy for distinguishing interstate from intrastate commerce, and imposing a heavier burden on the former, it should be reviewed with the same critical eye.⁶

Respondent Sizemore asserts (Opp. 16) that, in the absence of the safe harbor he proposes, the states will be precluded from taxing most commercial activities. That concern is preposterous. Only in cases in which a disproportionate percentage of the taxed activity is interstate in nature and a disproportionate percentage of the exempt activity is intrastate in nature would strict scrutiny possibly apply. Even if there were such a disparity, the tax would be invalid only if there were a less

⁶ Can there be any doubt, for example, that if a state were to impose a highway user tax on vehicles used to haul products for hire, but not on vehicles used "noncommercially" to haul the operator's own products, strict scrutiny would be appropriate if it turned out that, as a result of the distinction, the tax fell disproportionately on trucks engaged in interstate commerce? Yet that is exactly what Alabama has done here by exempting from a disposal tax all waste that is disposed of at captive disposal facilities.

discriminatory means of achieving the purposes of the legislation.⁷

2. Respondents also contend that review is not warranted because the facts of this case establish that the Base Fee does not discriminate against interstate commerce in its practical effect. Sizemore Opp. 3-5, 18; Hunt Opp. 18-19 & n.18. Of course, neither of the courts below considered that question. And respondents do not dispute that the Base Fee was motivated by an intent to discriminate against interstate commerce, a factor that this Court has accorded great significance in determining whether to subject a neutral statute to more searching scrutiny. See Pet. 22 n.12. Moreover, because it is not clear what standard applies in evaluating a claim that a facially neutral statute discriminates against interstate commerce in purpose and effect, it is impossible to determine which side the record supports.

In any event, respondents' evaluation of the record is in error. Respondents contend that, for purposes of determining whether the Base Fee discriminates in its practical effect, the only relevant waste is landfilled waste and that most Alabama waste that is landfilled is subject to the Base Fee. However, the Base Fee applies not just to landfilling, but to all forms of "disposal," a term that is defined very broadly in the statute (see Pet. 19). This definition by its plain terms encompasses the full range of activities qualifying as "disposal," including treatment or storage of any hazardous waste (including wastewater) in a manner that does not preclude its entering the environment or being discharged into the waters of the State. Indeed, it was undisputed at trial that the disposal fee is being paid by the operator of a hazardous waste incinerator. Tr. 392, 409-410. By the

⁷ Respondent Sizemore worries (Opp. 16 n.10) that failure to adopt his proposed *per se* rule would force the Court to engage in linedrawing. Because the lower courts have been struggling with these issues for many years (see cases cited at Pet. 25-27), that is a reason for granting certiorari, not for denying it.

same token, surface impoundments and waste piles plainly fall within the definition of "disposal."

If Alabama waste stored or treated in surface impoundments and waste piles is included in the calculation, as the statute's own definition of "disposal" clearly requires, the exemption for noncommercial facilities has the effect of exempting 99% of in-state waste from the Base Fee.⁸ That result is precisely the kind that courts outside of Alabama have found more than sufficient to categorize the state law as discriminatory in effect.

Respondent Hunt takes a different tack, arguing (Opp. 16-17) that Alabama's exemption of noncommercial facilities is justified because such facilities do not manage the same volumes of waste as commercial facilities and therefore do not involve the same degree of risk. Ironically, Hunt himself points out (*id.* at 16 n.14) that only commercial facilities are "subject to rigorous" regulation and does not dispute the testimony of his own witness that the Emelle facility is safer than noncommercial facilities (see Pet. 19 n.10). What is more, he utterly fails to come to grips with the fundamental flaw in his argument: a per-ton tax like the Base Fee already fully takes into account the asserted fact that greater amounts of waste result in a greater degree of risk. See Pet. 19-20 n.11.

Finally, respondent Hunt is quite mistaken in suggesting (Opp. 19) that if Alabama is not permitted to restrict the Base Fee to commercial facilities it will be unable to achieve its environmental objectives. A per-ton fee on all waste disposed of in Alabama would achieve the State's objectives *more* effectively than the existing discriminatory fee. It is only the *illegitimate* objective of discouraging the importation of waste that an even-handed fee would fail to achieve.

⁸ Even excluding the 690,000 tons of wastewater that respondent Sizemore asserts no longer are generated (Opp. 3), 98% of the waste generated and disposed of in Alabama is exempt from the Base Fee.

C. The Cap Provision

Respondents do not dispute our submission (Pet. 27) that invalidation of either or both of the fees at issue in this case would require invalidation of the Cap Provision.⁹ Respondents do attempt to answer our other challenges to the Cap Provision, asserting that courts have approved annual limitations on the amount of waste that may be disposed of at a waste disposal facility. Sizemore Opp. 19-21; Hunt Opp. 21. But we do not challenge annual limits in general. The question here is the discriminatory manner in which the limit has been imposed in Alabama, discrimination identical to that embodied in the two fees. As to that claim, respondents are silent.

Respondent Hunt asserts (Opp. 21-22) that the exception to the Cap Provision does not facially discriminate against out-of-state waste because Alabama could invoke that exception to meet its contractual obligation to provide disposal capacity for certain kinds of waste generated outside the State. This argument was never made to either of the lower courts. But interpreting the Cap Provision's exception as a reciprocity provision between Alabama and certain other states simply confirms that the provision is facially discriminatory: this Court has long held such provisions invalid on that ground. See, e.g., *Limbach*, 486 U.S. at 273. Indeed, it was precisely that kind of selective discrimination that was struck down in *NSWMA*. See 910 F.2d at 719-721. Respondents' eleventh-hour argument thus only confirms the need for review of this question.

⁹ Respondent Hunt points to an article discussing CWM's revenues (Opp. 20 n.20), claiming that it shows that the decline in the amount of waste disposed of at the Emelle facility was caused by factors other than the challenged taxes. The draconian effect of those taxes is demonstrated by the fact that disposal volumes dropped 63% at the Emelle facility for the first half of 1991, an amount much greater than the decline in first quarter revenues cited by Hunt. The participation in this litigation of representatives of most of the Nation's waste generators shows that CWM's customers believe that Alabama's taxes are what is obstructing the flow of interstate commerce.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1991

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No. 91-471

IN THE
Supreme Court Of The United States

October Term, 1991

CHEMICAL WASTE MANAGEMENT, INC.,
Petitioner

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA;
ALABAMA DEPARTMENT OF REVENUE; AND
JAMES M. SIZEMORE, JR., COMMISSIONER OF THE
ALABAMA DEPARTMENT OF REVENUE,
Respondents

**SUPPLEMENTAL BRIEF FOR THE RESPONDENT
GUY HUNT IN REPLY TO THE AMICUS CURIAE BRIEF
OF THE UNITED STATES**

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**SUPPLEMENTAL BRIEF FOR THE RESPONDENT
 GUY HUNT IN REPLY TO THE AMICUS CURIAE
 BRIEF OF THE UNITED STATES**

The Solicitor General is Appearing For a Client Agency.

The January 7 brief of the Solicitor General is **not** filed as a disinterested exposition on behalf of the greater, unrepresented public interest. It is clearly a statement of the parochial position of the Environmental Protection Agency.¹ As a result of Superfund cleanups, EPA is tradi-

¹Attached as an Appendix is a well balanced magazine article entitled, "The Hazardous Waste War", *Governing*, November, 1991. This provides an independent factual account of the problem.

tionally the largest customer or supplier of the hazardous waste landfill facility at Emelle, Alabama. EPA issued the hazardous waste permit for the Emelle facility and has since assisted the petitioner in making Emelle the world's largest hazardous waste commercial landfill. Toxic and deadly substances are being buried there in quantities never before assembled in one location.

Alabama's Legitimate and Well-Founded Concerns are Admitted.

The Solicitor General admits that the State of Alabama "plainly has legitimate and well-founded concerns" involving the "health, safety and welfare of its citizens", and that, as a consequence, "enjoys a large measure of legislative and regulatory authority over the Emelle facility under its traditional police powers." Brief for the United States as Amicus Curiae at 8 ("Brief"). Nevertheless, the Solicitor General contends the additional fee on out-of-state hazardous waste is not "necessary or appropriate." Brief at 9. He suggests Alabama's only remedy is to present those concerns to Congress. Brief at 11. Two points are submitted in reply.

The first is that the proposed remedy through Congressional action is illusory. Congress has done nothing. Should the decision of the Alabama Supreme Court be set aside, in all probability Congress will continue to do nothing. The votes are simply not there, due to the "NIMBY" syndrome existing in practically every one of the great majority of states which do not have a permitted hazardous waste commercial landfill.² The only way

²See the quoted comments of Linda W. Little, Executive Director of North Carolina's Waste Management Board that appear in the Appendix, *Governing*, supra, at A-7-A-8.

to obtain Congressional action is to have the non-complying states realize that differential fees as recommended by the National Governors' Association are a reality.

The second point in reply is that Congressional action is *not* necessary to approve differential fees. The admittedly legitimate "safety, health and welfare" concerns of Alabama for its citizens distinguish this hazardous waste problem from both the factual and legal contexts of *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).³ As the Solicitor General's brief notes, the Supreme Court of Alabama determined in this case that *City of Philadelphia* is "inapplicable in the context of hazardous waste disposal." Brief at 7.

The "Base Fee" and "Cap provision" are NOT Appropriate Issues for Review or Remand.

With respect to issues 2 (the "Base Fee") and 3 (the "Cap Provision"), the petitioner did **not** meet its burden of proof in establishing that under the evidence presented, any constitutional infirmity exists. In effect, the Solicitor General so concedes by arguing that a remand would be necessary on these issues. Further, the legislative findings and the extensive findings of fact by both courts below reflect that Act 90-326 goes well beyond the mere raising of revenue for the State of Alabama. The balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), is clearly the appropriate legal standard for review of such statutes.

³Inexplicably, the Solicitor General mentioned only "the greater environmental risks associated with hazardous waste" in asserting that *City of Philadelphia* is controlling. Brief at 12-13. No mention was made at that point in the Solicitor General's brief of the admittedly legitimate "safety, health and welfare" concerns. The omission is particularly significant in that cancer or other disease-caused deaths stemming from hazardous waste contamination cannot be later "reimbursed".

Summary Disposition is Inappropriate.

What is perhaps most objectionable is the Solicitor General's suggestion that this Court "may wish to consider summary reversal" of the differential or additional fee issue. Brief at 20. How can that be appropriate after (1) he admits that the State of Alabama has "legitimate concerns" for the "health, safety and welfare" of its citizens, (2) he admits that the issue here is a significant one,⁴ and (3) considering that his major authority is *City of Philadelphia*, a 14 year old divided decision of this Court concerning only solid waste (or garbage) in which, unlike the record in this case, there were no valid reasons for treating out of state waste differently?

Should this Court decide to grant the petition, a full review would be in order rather than a summary disposition. Not even the petitioner suggested otherwise. Perhaps the most serious deficiency resulting from the drastic curtailment inherent in a summary disposition would be the deprivation of the opportunity for other states and interested groups to submit briefs as amicus curiae, even though the Solicitor General was invited to do so.

⁴The full quote is, "More broadly, however, the struggle between petitioner and the State of Alabama does not stand alone on the legal landscape. Disposal of waste — whether solid, hazardous, or nuclear — has become an extremely controversial and divisive issue across the Nation". Brief at 7. Also, see the attached Appendix.

CONCLUSION

In any event, the unanimous decision of the Supreme Court of Alabama is well supported by this fact intensive record and by *Maine v. Taylor*, 477 U.S. 131 (1986). The petition should be denied.

January, 1992

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APPENDIX

A-1

GOVERNING,
The Magazine of States and Localities
November 1991

THE POISONOUS WAR
OVER HAZARDOUS WASTE

By Jonathan Walters

As with most siblings, North and South Carolina have had their rivalries, some dating back to when the colony of Carolina was carved in two in 1710. But it was a problem with a modern flavor—the disposal of hazardous waste—that made South Carolina Governor Carroll Campbell's blood boil.

He was furious about a state-by-state "environmental report card" released last summer by a major environmental consulting firm. It ranked the Palmetto State in the relatively dirty bottom 25 and put the Tar Heel State in the cleaner-and-greener top 25. Unfair, insisted Campbell. The reason for the disparity, he said, was that South Carolina had become the dumping ground for North Carolina's hazardous waste. Campbell went so far as to travel to Washington to see if he could persuade officials at EPA to pull some of North Carolina's Superfund money.

"North Carolina is a neighbor and a sister state," says Tucker A. Askew, Campbell's press chief. "The governors of the two states are friends, and yet we remain in pitched battle over North Carolina's intransigence and unwillingness to honor its own commitments to site facilities."

Indeed, the hazardous waste dumping issue has made for bad blood among a lot of states. Arizona, Idaho, Nevada, and Utah are all displeased with California for shipping millions of tons of hazardous waste to them. Ohio is unhappy with New Jersey, among others. Alabama has had it with nearly two dozen states, from Massachusetts to Mississippi.

Fueling this modern war between the states is the roughly 240 million metric tons of industrial solvents, dioxin, pesticides, acids, herbicides, PCBs, heavy metals and hundreds of

other toxic materials produced each year by farming, manufacturing and a wide variety of service industries. Disposal of the waste is the diciest, most divisive political issue to hit states and localities in decades.

The flash points are easy to spot: States that have traditionally acted as receptacles for other states' hazardous waste—Alabama, Louisiana, Ohio and South Carolina, among the leaders—are fed up and are starting to do everything in their power not to take it anymore, or at least not as much of it.

At some point last winter, Alabama officials believe Louisiana took over from Alabama the undesirable distinction of being the number one recipient of out-of-state hazardous waste. Louisiana's leap into the lead was no accident, however. It was the direct result of a policy adopted by Alabama to reduce the amount of hazardous waste flowing in.

Alabama has become much more militant in rejecting its traditional role as hazardous waste dump to the Southeast and the nation. Toward that end, the Alabama legislature in the summer of 1989 passed a tough two-tiered tipping tax on hazardous waste being dumped within its borders. Waste generated in-state would be taxed at \$40 a ton; out-of-state waste would be taxed at a whopping \$112 a ton.

The effect was immediate and profound. The flow of material into Chemical Waste Inc.'s Emelle, Alabama, hazardous waste site, the largest such dump in the country, quickly eased. The facility, which had handled more than 800,000 tons of hazardous waste the year before, received less than half that amount the following year.

Alabama officials are also pleased with the fiscal result—the \$30 million-plus from the tax that has so far poured into the state's general fund. Chemical Waste Inc. isn't so pleased; the company took the state to court over the tax. The Alabama Supreme Court ruled in the state's favor, but the company has appealed the case to the U.S. Supreme Court, charging that the tax violates the Commerce Clause of the U.S. Constitution, which the industry interprets as guaranteeing the unfettered flow of tainted trash as though it were a commod-

ity like any other—cars, food or television sets.

For the time being, however, the tax is accomplishing its main purpose: reducing the amount of hazardous waste coming into Alabama. "Nobody," says Ron Farley, associate general counsel with the Alabama Department of Environmental Management, "wants to be number one."

That goes for Louisiana, too, which disputes Alabama's assertion over its ranking and has passed taxes of its own on waste. Those taxes are also being challenged in court.

But ranking is really not the issue. The issue is which states are taking the nation's hazardous waste and which states are dishing it out. The issue is also whether those states that are handling more than their fair share are being adequately compensated for their trouble.

As of 1987, 15 states were net importers of hazardous waste and 35 were net exporters, according to the most recent data submitted to the U.S. Environmental Protection Agency under the federal capacity assurance plan program, which requires each state to assure EPA that it has a plan for handling its future hazardous waste disposal needs. There is no real geographic pattern to which states are importers and exporters, with the exception of the New England states, all of which are net exporters. (*See map, page 35.*)

Who imports and who exports was set (in stone, say some exporters) with the 1984 reauthorization of the federal Resource Conservation and Recovery Act, which put in place stringent standards both for how various types of waste would be handled (burned or buried, for example) and for the permitting of hazardous waste facilities.

The net importers think the net exporters are taking advantage of the importers' natural resources, possible environmental future, legal position, patience and goodwill. The response of exporters is now rote recitation: We are trying, they say, but tough siting standards combined with local opposition make it virtually impossible to establish new facilities. In fact, only one new disposal facility has gone on line since the 1984 RCRA reauthorization; all of the other current facilities

are the same ones that were operating then; they were granted interim permits under the reauthorization.

The issue of siting hazardous waste facilities is a tough one. Most state and local politicians—not to mention the hazardous waste disposal industry—do not want to invite the bruising local political battles that are invariably involved. "And as long as they don't have to, they won't," says E. Dennis Muchnicki, senior environmental policy adviser with the Ohio attorney general's office, which has been in the thick of some of the federal court battles over interstate bans on hazardous waste.

Virtually all efforts by net importers aimed at curbing the inflow of waste these days are at the same time aimed at putting pressure on net exporters to site facilities within their own borders—to force those politicians in other states to face up to the tough political fights involved.

To apply that pressure, importing states are pursuing several avenues. For one thing, they want the right to ban hazardous waste imports from selected states. Targeted would be states that produce substantial amounts of hazardous waste but that have made no effort to establish facilities, as well as states that have adequate disposal facilities within their borders but ship some hazardous waste out anyway (California, for instance).

Net importers also want Congress to sanction a clear right to impose a tax or surcharge on out-of-state hazardous waste, both to compensate the residents of the host state for accepting the stuff and to provide funds for expensive cleanups that may be down the road. Importing states also want the right to investigate and even inspect the source of out-of-state hazardous waste if they feel it necessary. Improperly labeled hazardous waste shipped into Ohio in 1984 killed a man when it caused an incinerator to explode.

So far, net importers have been mostly thwarted in their efforts, however. Alabama and South Carolina have in the recent past banned the import of hazardous waste from certain states, and the bans have been struck down for violating

the Commerce Clause. In fact, it was after the U.S. 11th Circuit Court of Appeals struck down Alabama's ban on hazardous waste from 22 states that the Alabama legislature swung right around and passed its two-tiered tax.

Through state permitting procedures, New York state has closed all its commercial hazardous waste facilities to waste from states that refuse to enter into reciprocal agreements to take toxic waste from New York, a policy that the waste industry is considering challenging in court. Texas had instituted a temporary moratorium on siting facilities; it expired last month.

The net-exporter states frequently mentioned as the worst offenders mostly admit to their failings. "We're the bad boys," says Linda W. Little, executive director of North Carolina's Waste Management Board. She offers the exporter's standard defense: Governor James G. Martin has been working hard with industry on siting a facility, but he has been thwarted thus far by local opposition. Massachusetts, considered to be one of the worst of the bad actors, has in the last 10 years chosen a half-dozen sites for a hazardous waste facility; its Department of Environmental Quality has shot down each one.

"Most of the state regulators that I talk to from the exporter states acknowledge that we and the other importing states have a legitimate concern," says Alabama's Farley. "They say they would like to address the fairness issue. But 'when' and 'how' are good questions."

What happened with North Carolina is illustrative. When Alabama passed its interstate ban, it made it clear that states showing at least some inclination toward dealing with their own hazardous waste would be taken off the list of the Forbidden 22. North Carolina—prominent on that list—quickly swung into action to develop a siting plan. But after the 11th Circuit Court decision, the sense of urgency seemed to evaporate and the plans languished. "My impression is that when the 11th Circuit ruled against us, it took pressure off North Carolina to do anything," Farley says.

Net importers do not blame state and local officials solely, however. The hazardous waste disposal industry is not much interested in siting new facilities, some state officials charge. Why invite the public relations hassle of siting new facilities when you can make money off the ones you have open already? "Industry doesn't want new facilities," says Ohio's Muchnicki. "They have a vested interest in running the old facilities into the ground."

That, the industry responds, is garbage. The industry would be happy to fulfill its role if states would only fulfill theirs, says Bob Eisenbud, Waste Management Inc.'s government affairs director. He thinks politicians and bureaucrats in states not pulling their waste disposal weight need to be more aggressive in their pursuit of sites and more helpful in the processing of site permits. "We don't like this situation where states default on pledges [to site facilities]. After all, we stand to be ones who site the facilities."

Some officials hope that EPA, through its authority to withhold Superfund money, will scrutinize states' capacity assurance plans and pressure the worst of the exporters to get serious about siting facilities. But EPA has shown little enthusiasm so far for doing so.

Withholding Superfund money would not work anyway, believes Frank Coolick, administrator of hazardous waste regulation for New Jersey, which imports about as much hazardous waste as it exports. "The question in the bad states is how to get the politicians to act responsibly. Do you think governors or legislators are going to take the heat if a state's Superfund money gets yanked? Absolutely not. They'll blame Frank Coolick and the agency; they'll say we submitted a bad capacity assurance plan."

Only one state, Colorado, has sited a disposal facility since the 1984 RCRA reauthorization. The landfill in a small town called Last Chance opened last July. The process took 10 years and involved lawsuits filed both by the owner of the site, Browning-Ferris Industries (which has since sold it to a new company) and by opponents of the facility.

The only other facility even close to reality (a reality that is still years away, however) is an incinerator and landfill proposed for Lind, Washington. It is being developed by Environmental Control Services Corp., which was started by former EPA Administrator William D. Ruckelshaus, who now heads Browning-Ferris.

Instead of the old-style "jam-it-down-their-throats" route, which simply does not work these days, Ruckelshaus decided to make proposals to localities, inviting them to solicit the facility. Lind got the nod on the strength of its location in the arid eastern part of the state and a 67 percent positive response to a local referendum on the siting proposal. Industry and public officials are watching the experiment closely.

In response to the growing impatience and militancy of net importers, governors and state environmental protection officials are beginning to face the equity issue, sort of. In the name of "lowering the current temperature of debate," says Oregon's Fred Hansen, chairman of a committee of state environmental department heads looking into the issue, environmental officials and the National Governors' Association have been working on a proposal that would put pressure on net exporters to act.

NGA's new proposal, approved last August without vocal dissent, calls for a federal policy allowing selective state bans on hazardous waste (mostly on waste coming from states that have the capacity to handle it themselves), and for specifically allowing Alabama-style differential tipping taxes.

But the waste handling industry is not happy about the prospect of 50 sets of rules, regulations and tax tables covering waste disposal, and is not likely to sit still for Congress's sanctioning of bans and vastly variable tipping taxes.

The governors' idea, currently, is to push their proposal as part of the reauthorization of RCRA, which is more than three years overdue. But that plan's chances are considered slim. The monolith that NGA might have appeared to be last August will likely quickly come apart on Capitol Hill if NGA's proposal actually starts showing promise. North Carolina says

as much: "If we had hazardous waste facilities in place in North Carolina, we would endorse the governors' proposal 100 percent," says Linda Little. "But right now we would be in the peculiar position of endorsing something that might hurt us."

Ultimately, most believe that Congress will have to step in and somehow even the playing field, or at least force the bad-actor states to act better. Proposals include passing a federal tipping tax, collected on interstate hazardous waste shipments and distributed among the net importers. Other pressure tactics would include pushing the EPA to withhold funds from hazardous waste generating states that fail to take more responsibility for dealing with their own flows. Or Congress might eventually go along with the NGA proposal.

In the absence of federal action, the hazardous waste issue portends to get hotter. Net importers promise to continue the guerrilla tactics they have been adopting with increasing frequency: bans, taxes, tough permitting requirements or even outright permitting moratoria. "If any state wants to be creative in banning stuff from coming in, they can find ways to do it," says Oregon's Hansen. "It may not hold up in court, but it takes three years for it to get knocked down. They can disrupt the system."

That's the plan, says Robert W. King Jr., South Carolina's assistant deputy commissioner for environmental quality control. "This issue is not going to go away. People feel they're not being treated equitably, and they're not. We will continually strive to balance this situation. We're not going to stop."

GOOD ACTORS, BAD ACTORS AND THE FINE PRINT

As the map shows, 15 states are net importers of hazardous waste and 35 are net exporters. But on closer examination, that simple picture gets more complex.

The figures were provided to the U.S. Environmental Protection Agency by the states under EPA's capacity assurance plan program. The numbers are old, however, dating back to 1987, and the status of some states—Colorado and New Jersey, for example—may have reversed since then.

Even when they were fresh, the numbers were considered suspect in some quarters. Some importing states charge that some exporting states fudged the figures in order to make it look like they were handling more of their own waste than they actually were.

Furthermore, the map is only a very general guide to which states are and are not pulling their hazardous waste disposal weight. A large handful of the states listed as net exporters—Alaska, Nevada, South Dakota, Vermont and Wyoming, for example—neither produce nor export very much hazardous waste, and so should not be condemned for not dealing with their own waste problems, net importing states acknowledge. A handful of states, including California, Massachusetts, North Carolina and Pennsylvania, are considered woefully and deliberately negligent.

While some state officials consider the capacity assurance plan numbers suspect, numbers compiled independently by EPA confirm the patterns outlined by the map. Those numbers, too, are old, however, also dating back to 1987. According to EPA's indepen-

dently compiled statistics, Pennsylvania exported more hazardous waste in 1987 than any other state, 333,000 tons; Ohio imported more than any other, 486,000 tons . But if the difference between waste imported and waste exported by states is calculated, Pennsylvania was not the worst offender, nor was Ohio the most beleaguered victim.

California led net exporters, shipping out 196,000 more tons of hazardous waste than it imported; Pennsylvania exported a net of 111,000 tons. Indiana led net importers with 289,000 tons of waste, while Ohio imported a net of 211,000 tons.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC.,
Petitioner,
v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA; ALA-
BAMA DEPARTMENT OF REVENUE; and JAMES M. SIZE-
MORE, JR., COMMISSIONER OF THE ALABAMA DEPART-
MENT OF REVENUE,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Alabama

**SUPPLEMENTAL BRIEF OF COMMISSIONER
SIZEMORE AND THE ALABAMA DEPARTMENT OF
REVENUE IN REPLY TO BRIEF OF THE
UNITED STATES AS AMICUS CURIAE**

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QUESTIONS PRESENTED

1. Where the health and safety of Alabama's citizens, and its environment, are placed at risk by the land-filling of hazardous waste at Petitioner's commercial facility (which receives 85% to 90% of its hazardous waste from out-of-state), does the Commerce Clause prohibit Alabama from limiting the health, safety and environmental risks by imposing a disincentive in the form of a \$72 per ton disposal fee upon such imported hazardous waste?

2. Does a \$25.60 per ton levy imposed evenhandedly on the commercial landfilling of in-state and out-of-state hazardous waste violate the Commerce Clause simply because the levy does not apply to non-commercial disposal of hazardous waste, and Petitioner's commercial activity most often involves out-of-state hazardous waste?

3. Does the Cap Provision, which limits growth in the annual volumes of landfilled hazardous waste and applies evenhandedly regardless of the origin of the waste, violate the Commerce Clause?

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The Solicitor General's brief reflects a fundamental
lack of understanding of the prior decisions of this Court
upon which the decision of the Supreme Court of Alabama
is based.

I. THE ADDITIONAL FEE

The Solicitor General's recommendation for summary
reversal is based upon *Philadelphia v. New Jersey*, 437
U.S. 617 (1978), a case which the Supreme Court of
Alabama distinguished on the basis of this Court's own
interpretations of that case and on the same basis that

this Court distinguished that case in *Maine v. Taylor*, 477 U.S. 131 (1986).

Although recognizing that the health and safety of Alabama citizens and the environment of the State are placed at risk by Petitioner's activities, the Solicitor General fails to acknowledge that the traditional police powers of the states include the power to regulate or limit *importation* of articles which create risks of the nature involved.

The Solicitor General's argument that the legitimate state concerns intended to be addressed by the Additional Fee could be served by non-discriminatory alternatives rests on the failure to identify correctly the legitimate state concerns which the Additional Fee serves. The Solicitor General entirely fails to address the underlying premise of the holding below—that the State has a legitimate interest in controlling the risks created by the rapidly growing volumes of additional hazardous wastes being brought into the State, separate and apart from the State's interest in controlling the risks of such wastes being generated within the State. The Additional Fee is not based solely on the origin of the waste. It is based on the fact that the waste to which it applies is by far the largest and most rapidly growing source of the environmental and public health concerns involved, and upon the compounding of dangers to the State which results from allowing such additional waste to be brought into the State. Alabama is not attempting to limit the importation of out-of-state hazardous waste because the waste is *out-of-state* hazardous waste; it is doing so because it is *out-of-state hazardous* waste.

The Solicitor General incorrectly attempts to distinguish this Court's decision in *Maine v. Taylor* when he states that "the dispositive fact in that case was that the out-of-state bait fish contained a parasite that the local fish did not, and thus posed a new risk." Brief of U.S. at 10. The risk was not "new." The district court

found that at least some of the parasites Maine sought to exclude were already present in the state,¹ and the First Circuit would have struck down the Maine regulation in part on the grounds that "Maine provides no protection against in-state parasites and related harms that may exist at large in-state hatcheries." *U.S. v. Taylor*, 752 F.2d 757, 765 (1st Cir. 1985), *rev'd sub nom. Maine v. Taylor*, 477 U.S. 131 (1986). This Court found it to be "of little relevance that fish can swim directly into Maine from New Hampshire." *Maine v. Taylor*, 477 U.S. at 151.

The Solicitor General's interpretation of the "dispositive fact" in *Maine v. Taylor* and his attempt to distinguish that case appear to be based on an assumption that in order for a state to regulate the importation of noxious items, the items must create a risk different *in kind* from problems already existing within the state, and that a state may not regulate the importation of items which create risks markedly greater *in degree*. Such a distinction between risks different in kind and risks different in degree has not been the basis for this Court's prior decisions, and there is no logical reason for creating such a distinction. Under the Solicitor General's construction of the Commerce Clause, a state trying to cope with the problems of disease afflicting in-state livestock could not regulate the importation of more diseased animals into the state because these additional diseased animals would not create a "new risk"—the problems would merely be increased in degree.

This Court's decision in *Philadelphia v. New Jersey* did not turn on a distinction between risks new in kind versus risks greater in degree. The Court treated the New Jersey statute as economic protectionism—protecting New Jersey residents from economic competition for landfill space.

¹ *U.S. v. Taylor*, 585 F. Supp. 393, 395 (D. Maine 1984), *rev'd*, 752 F.2d 757 (1st Cir. 1985), *rev'd sub nom. Maine v. Taylor*, 477 U.S. 131 (1986).

That case does not hold that all state restrictions on the importation of wastes are due to be summarily struck down without regard to whether the measure involves protection against serious threats to the health and safety of a state's citizens and its environment, or merely simple economic protectionism.

The Solicitor General argues that under *Philadelphia v. New Jersey*, any state which permits the disposal within the state of its own waste is condemned to accepting the waste of all other states. See Brief of U.S. at 13. Under such a rule, what state without a hazardous waste disposal facility at this time would be so foolish as to permit the first such facility within its borders? The construction of the Commerce Clause advanced by the Solicitor General would discourage states without facilities from developing such facilities and disposal technologies. This construction perpetuates the existing situation where the few states which have been responsible enough to permit facilities within the state to dispose of their own waste are faced with the overwhelming burden of serving as the nation's dumping grounds for hazardous and toxic wastes.² This is not what the Commerce Clause was intended to accomplish and it is not what this Court's decisions require.

The underlying problems giving rise to the first question presented, if in need of a solution at the national level, are more appropriate for resolution by a comprehensive legislative compromise by Congress than by piecemeal adjudication by the courts.

² Such a perpetuation of the existing imbalance would clearly benefit Petitioner by protecting its position in the market. It is not clear, however, why the Solicitor General or the Environmental Protection Agency would wish to perpetuate such a situation.

II. THE BASE FEE

Although the solicitor General's entire discussion of the Additional Fee focuses on analyzing that fee as a *regulatory* measure, the Solicitor General asserts that the courts below failed to properly analyze the Base Fee as a tax, and erred in subjecting the Base Fee to analysis as a regulatory measure. The analysis of the courts below shows that the Base Fee satisfies the test for a tax as well as the test for a regulatory measure. In applying the test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the courts below subjected the Base Fee to an *additional* level of review.

The Solicitor General recognizes that the Base Fee clearly satisfies three of the four parts of the *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), Commerce Clause test for state taxes. Brief of U.S. at 14-15. The only relevant question, under the test applicable to state taxes, is whether the Base Fee discriminates against interstate commerce. The courts below did not, as the Solicitor General asserts, merely find that the Base Fee does not *facially* discriminate, and then apply the *Pike* test. The courts below held that "[Petitioner] has failed to establish that the Base Fee has discriminatory effects on interstate commerce." Pet. App. 66a (trial court); *id.* at 19a (Supreme Court of Alabama) (emphasis added). Thus the courts below held that Petitioner failed to satisfy its burden of proof on the only factor of the *Complete Auto* test as to which there might have been any question.

If the Base Fee is analyzed simply as a tax, this ends the inquiry. This Court's cases do not suggest that the state needs some health, safety or other justification for a tax which applies equally to intrastate and interstate commercial transactions. The Solicitor General's discussion of factual risk-related comparisons to non-commercial

activity not subject to the Base Fee is relevant only in analyzing the Base Fee as a *regulatory* measure.³

Having concluded that the Base Fee *regulates* in a non-discriminatory manner (Pet. App. 17a; *id.* at 64a), the courts below went further than merely finding a non-discriminatory tax, and applied the *Pike* test to analyze the regulatory function. Contrary to the Solicitor General's assertion (Brief of U. S. at 16) the courts below did not uphold the Base Fee under *Pike* merely by finding a benefit to the state in the form of revenue. In addition to compensation to the state for the risks involved, the courts below found the Base Fee to further the State's interests in deterring hazardous waste landfilling and fulfilling the other health, safety and environmental objectives of the legislation. See Pet. App. 64a, 67a; *id.* at 17a, 20a.

There is no unresolved factual dispute "over the appropriate categorization of surface impoundments." Brief of U. S. at 18. The factual determination which the Solicitor General would have the courts below undertake on remand (Brief of U. S. at 18) has in fact already been made. The trial court, in its findings of fact, found that non-commercial facilities (including surface impoundment wastewater treatment) are not comparable to commercial facilities such as that operated by Petitioners and that because of the transportation risks, volumes and accumulation associated with commercial facilities, "the public health and safety risks associated with commercial hazardous waste facilities are much greater than those associated with non-commercial facilities." Pet. App. 63a-64a.

Although there may be some question as to the necessity of subjecting a tax which satisfies all parts of the *Com-*

³ The Solicitor General erroneously refers to surface impoundment wastewater treatment as being exempted from the Base Fee. Surface impoundments are not necessarily exempted; noncommercial surface impoundments are not subject to the Base Fee, not because they are surface impoundments but because they are noncommercial.

plete Auto test to additional review under *Pike*, if the courts below concluded that the tax also functioned as a regulatory measure then such analysis was not improper. In any event, because the decisions below show that the Base Fee satisfies *both* the test applicable to state taxes and the test applicable to regulatory measures, there is no need for remand and no need for further review by this Court.

III. THE CAP PROVISION

The Solicitor General, while agreeing that the Commerce Clause does not prevent a state from controlling the total volumes of waste disposal within the state, asserts that the provision authorizing the Governor to allow the annual limit to be exceeded in the event of a public health or environmental emergency in the state raises a "substantial issue under the Commerce Clause of under-inclusion." Brief of U. S. at 19. The Solicitor General's argument suggests that an otherwise valid enactment may violate the Commerce Clause simply because the legislature wisely provided some flexibility in the event of a situation where the state's interest in protecting public health and the environment would be better served by allowing the cap to be exceeded than by inflexible enforcement. There is neither a legal basis nor any logical reason to support this contention that an otherwise valid measure may violate the Commerce Clause by allowing some flexibility in the event of an emergency within the state, or that the state must be required to similarly respond to any need which may arise in all other states. These arguments were made by Petitioner in the courts below and properly rejected. There is no need for further review by this Court and certainly no need for remand on this issue.

CONCLUSION

The decision below is based upon and in accord with this Court's decisions. There is no need for further review of any of the questions presented. However, should the Court decide to grant the Petition as to the first question presented on a record which unquestionably establishes that this case involves health and environmental protection, not simple economic protectionism,⁴ the issues involved would certainly deserve this Court's full consideration of the merits.

Respectfully submitted,

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January 1992

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⁴ We believe that the majority opinion in *Philadelphia v. New Jersey* applies the correct rule of decision where the court rejects purported health, safety or environmental concerns and finds a state measure to involve simple economic protectionism, and that the dissent expresses the correct rule of law where the court accepts that the state is in fact acting in response to legitimate concerns.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC., PETITIONER

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA**

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE**

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QUESTIONS PRESENTED

1. Whether a disposal tax that applies only to wastes generated outside the State violates the Commerce Clause.

2. Whether a disposal tax that applies only to waste disposed of at "commercial" hazardous waste disposal facilities violates the Commerce Clause.

3. Whether a limitation on the amount of hazardous waste that may be disposed of annually at such facilities violates the Commerce Clause.

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**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE**

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Petitioner owns and operates the Emelle Facility, a hazardous waste treatment and disposal landfill in western Alabama. In 1987, the United States Environmental Protection Agency issued a permit for the Emelle Facility under the provisions of the Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.* (RCRA). Under that Act the EPA Administrator is charged with "establishing such performance standards as may be necessary to protect human health and the environment." 42 U.S.C.

6924(a). Permits may be issued upon a determination of compliance with those standards. 42 U.S.C. 6925(c).

RCRA, however, is an exercise in cooperative federalism. States may be authorized to administer and enforce an equivalent hazardous waste program in lieu of the federal program. 42 U.S.C. 6926. In addition, "[n]othing in [RCRA] shall be construed to prohibit any State from imposing any requirements which are more stringent than those imposed by [federal] regulations." 42 U.S.C. 6929. Alabama, in fact, has a permitting requirement applicable to the Emelle Facility pursuant to Ala. Code § 22-30-12.

In the late 1980's, Alabama and its officials became alarmed about the large volume of hazardous wastes, principally from outside Alabama, brought to the Emelle Facility for disposal. The Emelle facility receives a considerable portion of all hazardous waste which is generated and landfilled in the United States. The overwhelming majority of hazardous waste received at Emelle comes from outside the State of Alabama. The State's response to these circumstances principally has been to erect barriers to the interstate component of the waste disposal activities at Emelle. First, in 1988, state officials sued the Environmental Protection Agency to restrain shipments of PCB-contaminated dirt from a Texas Superfund site to the Emelle Facility. See *Alabama v. EPA*, 871 F.2d 1548 (11th Cir.), cert. denied, 493 U.S. 991 (1989). Alabama obtained preliminary and permanent injunctive relief from the United States District Court for the Middle District of Alabama; on appeal, the Eleventh Circuit reversed, dissolved the injunction and dismissed the case for lack of subject matter jurisdiction. 871 F.2d at 1560. The delay in effectuating the Superfund remedy cost the government hundreds of thousands of dollars. See generally *Alabama ex rel. Siegelman v. EPA*, 925 F.2d 385 (11th Cir. 1991).

In the summer of 1989, the Alabama legislature and executive agencies took further steps to restrain petitioner's interstate trade at Emelle. The legislature enacted the Holley Bill, Ala. Code § 22-30-11 (Supp. 1989), which prohibited facilities in Alabama from accepting wastes generated in other States where the generating State either prohibits the treatment or disposal of hazardous wastes, or has no existing facility for the treatment or disposal of hazardous wastes and has not entered into an agreement with Alabama. On its effective date, the Holley Bill prevented the Emelle facility from accepting wastes generated in 22 States and the District of Columbia. The Alabama Department of Environmental Management also promulgated two sets of regulations in 1989. One set required the State's approval before wastes could be shipped to Emelle; the other set required certain types of hazardous wastes to be treated prior to disposal in a landfill.

Petitioner challenged the Holley Bill and both sets of regulations in a suit alleging violation of the Commerce Clause and the Supremacy Clause. The United States District Court for the Northern District of Alabama upheld the challenged law and regulations in early 1990. *National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management*, 729 F. Supp. 792. The Eleventh Circuit reversed in part and held that the Holley Bill violated the inherent prohibitions of the Commerce Clause because it "plainly distinguishes among wastes based on their origin, with no other basis for the distinction." *National Solid Waste Ass'n v. Alabama Dep't of Env'tl. Management*, 910 F.2d 713, 720, amended, 924 F.2d 1001 (1991), cert. denied, 111 S. Ct. 2800 (1991). In particular, the Eleventh Circuit found that the State's interest in ensuring adequate capacity for Alabama-generated wastes and the dangers of transportation of hazardous wastes did not justify the

State's differential treatment of out-of-state wastes. 910 F.2d at 720.

In 1990, the Alabama legislature enacted Act No. 90-326, which represents the third attempt in as many years to curtail petitioner's interstate commerce in hazardous wastes. Three parts of Act No. 90-326 are at issue here. First, Section 22-30B-23(b) imposes "an additional fee levied at the rate of [\$]72.00 per ton" for "waste and substances which are generated outside of Alabama and disposed of at a commercial site in Alabama." Pet. App. 106a (the Additional Fee). Second, Section 22-30B-23(a) levies "a fee to be paid by the operators of each commercial site for the disposal of hazardous waste in the amount of [\$]25.60 per ton." Pet. App. 106a. (the Base Fee). Finally, the Act restricts the amount of hazardous wastes that may be disposed of at any commercial site during any twelve-month period after October 1, 1991, to the amount that was disposed of during the period July 15, 1990 to July 14, 1991. *Id.* at 112a (the Cap Provision). The Act was to become effective on July 15, 1990. *Id.* at 113a.

Petitioner commenced this action in Alabama circuit court challenging Act No. 90-326 on federal and state constitutional grounds. After a trial, the circuit court found that the \$72 Additional Fee is unconstitutional as a violation of the Commerce Clause (Pet. App. 85a). It found that hazardous wastes are an article of interstate commerce and that the Additional Fee facially discriminates against such commerce. *Ibid.* The trial court also concluded that the State had failed to meet the heavy burden of demonstrating that the discriminatory legislation advances a legitimate state purpose that cannot be adequately served by non-discriminatory alternatives. *Id.* at 85a-86a. The court found that legitimate state concerns about the dangerousness of hazardous waste and the desire to minimize the generation of such wastes could more directly be met by non-

discriminatory measures; there was no demonstration that the Additional Fee could be deemed a compensatory tax to equalize the burden on in-state and out-of-state generators; and the State's interest in forcing other States to develop waste disposal capacity does not justify discriminatory legislation. *Id.* at 86a-88a & n.6.

On the other hand, the circuit court upheld both the Base Fee and the Cap Provision of Act 90-326. The court ruled that because those provisions do not facially discriminate against interstate commerce, the balancing test set forth in *Pike v. Bruce Church Inc.*, 397 U.S. 137 (1970), should be used to assess their validity. Pet. App. 66a, 72a. Applying that test, the court concluded that the local benefits of the Base Fee's compensation for the financial risks to the State for hazardous waste disposal activities and its deterrence to landfilling hazardous wastes are not clearly outweighed by the impact on interstate commerce. *Id.* at 67a. Similarly, the Cap Provision was held to be supported by legitimate local interests in conserving the State's natural resources and protecting its citizens' health and safety that are not clearly outweighed by the impact on interstate commerce. *Id.* at 72a-73a. The court nevertheless noted (*id.* at 73a, 92a-93a) that the invalidity of the Additional Fee might require modification of the Cap Provision to reflect a base period unaffected by unconstitutional discrimination.

Both petitioner and the respondents appealed to the Alabama Supreme Court. That court upheld the circuit court's rulings on the Base Fee and Cap Provision on the basis of the lower court's opinion. Pet. App. 17a-37a. It reversed the circuit court's ruling that the Additional Fee is unconstitutional as a violation of the Commerce Clause. The state supreme court found that the Additional Fee serves legitimate local purposes that can not adequately be served by

nondiscriminatory alternatives -- specifically (*id.* at 44a):

- (1) protection of the health and safety of the citizens of Alabama from toxic substances; (2) conservation of the environment and the state's natural resources; (3) provision for compensatory revenue for the costs and burdens that out-of-state waste generators impose by dumping their hazardous waste in Alabama; (4) reduction of the overall flow of wastes traveling on the state's highways, which flow creates a great risk to the health and safety of the state's citizens.

The court noted that hazardous wastes are permanently buried at Emelle and stated that "nothing in the Commerce Clause compels the State of Alabama to yield its total capacity for hazardous waste disposal to other states" (*id.* at 45a). It concluded that a non-discriminatory tax on both Alabama and out-of-state generated waste is not an available alternative "because Alabama is bearing a grossly disproportionate share of the burdens of hazardous waste disposal for the entire country" (*id.* at 46a).

Justice Houston concurred. He reasoned that hazardous waste is not an article of commerce protected under the Commerce Clause of the Constitution, observing that the contrary conclusion of the Eleventh Circuit is not binding on the state supreme court (Pet. App. 48a).

DISCUSSION

The Supreme Court of Alabama and the United States Court of Appeals for the Eleventh Circuit have come to opposite conclusions concerning restrictions by the State of Alabama on interstate commerce in hazardous waste disposal. The state court has ruled in this case that the disproportionate role played by

the Emelle Facility in the national waste disposal effort is a legitimate state concern that justifies discriminatory burdens placed on disposal of wastes generated in other States. The Eleventh Circuit has ruled that such concerns do not authorize the State of Alabama to enact legislation that discriminates on the basis of the State of origin of the waste. In light of the Emelle Facility's role in the national waste disposal effort, this conflict concerning the law governing that facility, by itself, merits resolution by this Court.

More broadly, however, the struggle between petitioner and the State of Alabama does not stand alone on the legal landscape. Disposal of waste -- whether solid, hazardous, or nuclear -- has become an extremely controversial and divisive issue across the Nation. Many state and local governmental units have sought to relieve pressure generated by local constituencies by enacting legislation that discriminates against wastes generated out-of-state. Until the present case, in the absence of authorizing federal legislation,¹ those legislative efforts have regularly been struck down under authority of this Court's decision in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). The Supreme Court of Alabama, however, found that case inapplicable in the context of hazardous waste disposal. This Court's precedent is likely to encourage similar efforts by

¹ See, e.g., the Low Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. 2021b-2021i, discussed in the government's brief in opposition in *State of New York v. United States, County of Allegheny v. United States*, and *County of Cortland v. United States*, Nos. 91-543, 91-558, and 91-563.

other States.² Review by this Court is, in our judgment, therefore is warranted.

1. The State of Alabama plainly has legitimate and well-founded concerns about the disposal of hazardous wastes at the Emelle Facility. The health, safety and welfare of its citizens in the area of the facility, the safety of travelers on the roads leading to the facility, and the future condition of the natural resources and the environment of the State are all potentially implicated by the disposal of hazardous wastes. That being so, the State of Alabama enjoys a large measure of legislative and regulatory authority over the Emelle Facility under its traditional police powers.

The Alabama Supreme Court relied upon many of these concerns as the basis for upholding the Additional Fee enactment in this case (Pet. App. 44a). But because these legitimate state concerns can effectively be served by non-discriminatory enactments, we are unpersuaded that under this Court's jurisprudence they justify the Additional Fee requirement's discriminatory treatment of wastes generated out-of-state.

² In *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 792 (1991), the Fourth Circuit recently summarized the dangers inherent in such a proliferation of restrictive state laws:

[T]he effect of every state designing particular limits and bars for out-of-state waste could be catastrophic. Indeed, such treatment of hazardous waste—in essence, ensured nontreatment of some hazardous waste—might destroy not only the theoretical principle of a national economic union, but contains the real potential to destroy land, if not also persons, within the union. [B]etter that hazardous waste be treated and disposed of somewhere, even if spread disproportionately among the states, than that future Superfund sites arise.

In addition, the Alabama Supreme Court justified the discriminatory nature of the Additional Fee as a legitimate attempt to force

the states that are using Alabama as a dumping ground for their hazardous wastes to bear some of the costs for the increased risk they bring to the environment and the health and safety of the people of Alabama.

Pet. App. 44a. A tax or fee imposed upon the disposal of hazardous waste that is designed to compensate the State for the expenses of regulating, monitoring and dealing with the adverse effects of that activity clearly serves a legitimate state purpose. But a fee that discriminates against waste generated out-of-state is not necessary or appropriate for this purpose. Indeed, if a disproportionate portion of the hazardous waste disposed of in Alabama is generated out-of-state, then that same portion of a non-discriminatory tax on waste disposal would obviously be borne by generators in other States.

Alabama could properly impose a compensatory tax on interstate commerce in hazardous waste "that equalizes previously unequal tax burdens by offsetting 'a specific tax imposed only on intrastate commerce for a substantially equivalent event.'" *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 287 (1987); accord, *e.g.*, *Maryland v. Louisiana*, 451 U.S. 725, 759 (1981). But the circuit court correctly found (Pet. App. 88a n.6) that the State had not adequately demonstrated that the Additional Fee served as a compensatory tax for other taxes borne by in-state generators (*ibid.*). The Alabama Supreme Court did not disturb this finding, and respondents do not contend in this Court that the Additional Fee can be justified as a traditional compensatory tax.

Nor does the State's unquestioned power to protect its environment against the risk of degradation, recognized in *Maine v. Taylor*, 477 U.S. 131 (1986),

justify the discriminatory Additional Fee. *Maine v. Taylor* upheld the State's ban on the importation of live bait fish; the dispositive fact in that case was that the out-of-state bait fish contained a parasite that the local fish did not, and thus posed a new risk. Alabama has not established that the out-of-state waste disposed of at Emelle is significantly different from such waste generated in Alabama.³

Respondents assert (Hunt Br. in Opp. 12-13)⁴ that the discriminatory fee is warranted by the risk that, if the State is ultimately required to bear the costs of cleaning up the Emelle Facility, it will be unable to obtain any meaningful contribution from the out-of-state generators. But federal law provides the State with ample authority to impose the financial costs of cleaning up the Emelle Facility on the generators of the waste -- both in-state and out-of-state. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, generally subjects petitioner, as owner and operator of the facility, and the generators of the waste to strict, joint and several liability for "all costs of removal or remedial action incurred by a State." 42 U.S.C. 9607(a)(1) and (3)(A). See, *e.g.*, *O'Neil v. Picillo*, 883 F.2d 176 (1st Cir. 1989), cert. denied, 493 U.S. 1071 (1990). Furthermore, it is far from certain that any particular in-state generator, currently exempted from the Additional Fee, will be in existence or located in Alabama when and if clean-up of Emelle is eventually

³ Far from casting doubt on the continuing vitality of *City of Philadelphia, Maine v. Taylor* cites and quotes that decision with approval several times. See 477 U.S. at 148-149 & n. 19, 152.

⁴ "Hunt Br. in Opp." refers to the brief in opposition filed by counsel of record Bert S. Nettles. "Sizemore Br. in Opp." refers to the brief in opposition filed by counsel of record William Coleman.

required.⁵ Accordingly, respondents' asserted justification for the Additional Fee's disparate treatment of out-of-state generators based on the risk of ultimate state liability is highly speculative. Such speculative concerns do not support that Fee under this Court's precedents. To be sure, those concerns may properly be presented to Congress as a basis for urging enactment of federal legislation specifically authorizing States within which major hazardous waste disposal facilities are located to adopt designated limitations on interstate waste shipments.⁶ See Sizemore Br. in Opp. 7-8 (national waste disposal problems involve "policy issues in need of a comprehensive legislative solution by Congress"). But Congress has not acted in this respect. Absent such federal legislation, this Court's decisions make clear that the State is precluded by the Commerce Clause from granting Alabama's businesses preferential access to the Emelle Facility and imposing upon out-of-

⁵ In any event, any risks of ultimate state liability for the Emelle Facility that do exist are borne by the State and its taxpayers as a whole rather than the in-state generators of hazardous waste favored by the Additional Fee provision.

⁶ For example, Congress might consider the enactment of federal statutory provisions similar to those contained in the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. 2021b-2021i, discussed in the government's brief in opposition in *State of New York v. United States, County of Allegheny v. United States*, and *County of Cortland v. United States*, Nos. 91-543, 91-558, and 91-563. In fact, several bills contemplating limitations on, and the imposition of differential fees for, interstate waste disposal are currently pending before the House Committee on Energy and Commerce (*e.g.*, H.R. 739, 1525, 2380, 102d Cong., 1st Sess. (1991)) and the Senate Committee on Environment and Public Works (*e.g.*, S. 153, 174, 197, 241, 592, 102d Cong., 1st Sess. (1991)). Representatives of EPA have testified before these Committees regarding several of these bills, and the National Governor's Association has recently adopted a policy statement supporting congressional authorization of differential fees.

state generators a financial burden that the State is unwilling to place on its own citizens.⁷ As in *City of Philadelphia v. New Jersey*, 437 U.S. at 627, the State is pursuing entirely legitimate goals by means forbidden by this Court's precedents interpreting the Commerce Clause.

Several federal courts of appeals have found this Court's decision in *City of Philadelphia v. New Jersey*, *supra*, applicable to discriminatory state barriers to trade in hazardous waste disposal despite the obvious risks to the environment inherent in such substances. *National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management*, 910 F.2d at 718-719; *Hardage v. Atkins*, 582 F.2d 1264, 1266 (10th Cir. 1978); cf. *Illinois v. General Electric Co.*, 683 F.2d 206, 214 (7th Cir. 1982) (spent nuclear fuel) cert. denied, 461 U.S. 913 (1983); *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 631 (9th Cir. 1982) (low level radioactive waste), cert. denied, 461 U.S. 913 (1983). See also *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 787 (4th Cir. 1991) (preliminary injunction upheld on Commerce Clause grounds).⁸ The

⁷ This Court has long recognized that the Commerce Clause imposes restraints on discrimination by one State against the products of another that are analogous to the express limitations of Art. I, § 10, Cl. 2 on the power of a State, without congressional consent, to impose imposts or duties on imports from or exports to foreign countries. See, e.g., *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 136-140 (1869); *Coe v. Errol*, 116 U.S. 517, 526 (1886). The facially discriminatory tax imposed by the Additional Fee is the functional equivalent of a tariff at the State's border.

⁸ Federal district courts, relying on *City of Philadelphia*, have also invalidated discriminatory disposal fees. See *National Solid Waste Management Ass'n v. Voinovich*, 763 F. Supp. 244, 262-263 (S.D. Ohio 1991), appeal pending, No. 91-3466 (6th Cir.); *Government Suppliers Consolidating Services, Inc. v. Bayh*, 753 F. Supp. 739, 769-770 (S.D. Ind. 1990).

attempt of the Supreme Court of Alabama to distinguish this Court's precedent in *City of Philadelphia* on the ground of the greater environmental risks associated with hazardous waste is accordingly unsupported by lower court precedent. Where, as here, a facility is duly licensed and permitted for treatment and disposal of wastes generated within the State, we believe that *City of Philadelphia's* rationale precludes discrimination against similar wastes generated in other States unless Congress authorizes such discrimination -- which it has not done. The Additional Fee therefore does not meet the governing legal standard, which is whether Alabama "has legitimate reasons, 'apart from their origin, to treat [out-of-state waste products] differently.'" *Maine v. Taylor*, 477 U.S. at 152, quoting *City of Philadelphia v. New Jersey*, 437 U.S. at 627. Accordingly, the decision below upholding the Additional Fee is out of step with this Court's holding in *City of Philadelphia* and post-*Philadelphia* lower court precedent.

2. The second question presented is whether imposition of a Base Fee of \$25.60 per ton for substances consigned to a commercial hazardous waste disposal facility within the State violates the Commerce Clause despite its facial neutrality. Petitioner argues that the legislation categorizes waste disposal activities in a manner that subjects almost all waste generated outside the State to the Base Fee while practically exempting in-state generated waste. Pet. 18. This, together with the evidence of an express legislative purpose to discriminate against out-of-state generated waste, it argues, is sufficient to subject the Base Fee requirement to the strict scrutiny under the Commerce Clause applicable to facially discriminatory state actions. Pet. 18-21.

Respondents do not dispute that the Base Fee imposes a tax on interstate commercial activity. See Hunt Br. in Opp. 16; Sizemore Br. in Opp. 16-20. Instead, they contend that the Base Fee does not discriminate against interstate waste, but rather reflects a rational distinction between disposal of hazardous waste by landfill -- which occurs

almost exclusively at Emelle -- and the surface containment or treatment of waste water, which includes the bulk of the noncommercial disposal of hazardous waste generated within the State. Sizemore Br. in Opp. 18-19; Hunt Br. in Opp. 16-19. Respondents also assert that, because the Base Fee does not discriminate against interstate commerce on its face or in its effects, the Alabama courts correctly upheld it under the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) ("Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."). See Pet. App. 65a-67a; *id.* at 20a.

We submit that the Alabama courts erred in using the *Pike* balancing test -- which applies to disparate effects of *regulatory* measures -- to evaluate petitioner's challenge to the Base Fee as in effect a tax on the interstate disposal of hazardous waste. As this Court explained in *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981):

The State's right to tax interstate commerce is limited, and no state tax may be sustained unless the tax: (1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the State.

Accord, *e.g.*, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 287 (1977); *Amerada Hess Corp. v. New Jersey Taxation Division*, 490 U.S. 66, 72 (1989).

The Base Fee clearly satisfies three of the four relevant factors. The first factor requires a threshold inquiry to ensure that the interstate activity has sufficient relationship to the State to justify the levying of a tax on it. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981). Here, the fact that the disposal activities subject to the tax take place within Alabama provides the necessary state relationship. The second factor, fair

apportionment, requires consideration when a number of States could tax the same activity, raising the problem of multiple taxation. See *Amerada Hess Corp. v. New Jersey Taxation Division*, 490 U.S. at 73. Since the taxable event here, the disposal of waste, occurs solely within the State of Alabama, a state tax on that disposal cannot give rise to multiple taxation problems and raises no apportionment questions. Cf. *Commonwealth Edison Co. v. Montana*, 453 U.S. at 617 (severance tax).

The fourth factor is also satisfied here; the Base Fee is fairly related to the services provided by Alabama. The "fair relation" factor does not require a closer fit between the services provided by the State and the revenue generated by the tax than that imposed by the Due Process Clause. *Commonwealth Edison Co. v. Montana*, 453 U.S. at 622-623. It is sufficient if "the measure of the tax [is] reasonably related to the extent of the contact" (*id.* at 626, emphasis omitted). Accordingly, a tax measured by the tonnage of wastes disposed of within the State apparently satisfies the fourth factor.

The difficult question is whether, under this Court's taxation of interstate commerce jurisprudence, the Base Fee "discriminates against interstate commerce" (*Maryland v. Louisiana*, 451 U.S. at 754). The lower courts answered this question by first determining that the Base Fee did not facially discriminate against interstate commerce, and then holding that it satisfied the test of *Pike v. Bruce Church, Inc.*, *supra*. Pet. App. 20a; *id.* at 66a-67a. The first inquiry was plainly underinclusive, because this Court has consistently looked beyond facial non-discrimination in *tax* cases to evaluate the impact of the tax in practical effect and to evaluate the discriminatory purpose of a tax provision. See, *e.g.*, *Maryland v. Louisiana*, 451 U.S. at 756-757; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984).

The second inquiry is irrelevant. This Court's precedents do not rely on the *Pike* test in *tax* cases. By its own terms, that test applies to state regulation, not taxation (see quotation, p. 14, *supra*). Moreover,

considering "putative local benefits" in evaluating a State's obvious interest in tax revenues would suggest that any state tax scheme would meet the *Pike* test. Indeed, in the present case, the trial court found (Pet. App. 67a) that "[t]he fee benefits the state by compensating it for the financial responsibilities and risks it bears on account of commercial hazardous waste disposal activities." In the tax context, the *Pike* test would be virtually no test at all.

But this Court's decisions make clear that the Commerce Clause ban on discriminatory state taxes is not so easily avoided. This Court has stated that "a tax may violate the Commerce Clause if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce." *Amerada Hess Corp. v. New Jersey Taxation Division*, 490 U.S. at 75. The Court has applied this test to strike down state taxes that include credits or offsets for in-state activities. *Maryland v. Louisiana*, 451 U.S. at 756-757; *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 406-407 (1984). See also *New Energy Co. v. Limbach*, 486 U.S. 269 (1988). Even a facially neutral exemption from taxation is invalid if the exempted product or activity is likely to be a product of local business and a discriminatory purpose can be demonstrated. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 270; cf. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238, 2247 n.15 (1990).

The question presented by this case is nevertheless not the same as that in the exception, credit or offset cases. In the present case, the allegation is that when the legislature defined the taxable activity by limiting it to disposal at a "commercial site" (Pet. App. 105a), the state tax captured virtually all interstate commerce in hazardous waste and excluded almost all in-state generated waste. The lower courts found (Pet. App. 22a-24a; *id.* at 67a-71a) that commercial waste disposal differed sufficiently from the related non-commercial activity to permit the Base Fee to withstand an Equal Protection Clause challenge. It is, however, far from clear that that very permissive standard suffices in evaluating a dormant

Commerce Clause challenge to an allegedly discriminatory tax. This question was not considered below.

The factual context in which that question is presented in this case is also in dispute. The parties disagree in this Court about which in-state hazardous waste activities should be considered in evaluating the relative impact of the Base Fee on in-state and interstate commerce. The major dispute between the parties centers on how to characterize hazardous wastes undergoing treatment in surface impoundments. Such impoundments account for approximately two-thirds of in-state generated waste (see Pet. 5 n.2; Sizemore Br. in Opp. 3-4). The findings of fact in the lower courts do not directly address the status of these surface impoundments, although the issue was raised in petitioner's filings.⁹

The issue is not free from doubt. There are certainly differences between treatment of hazardous wastes in surface impoundments and disposal of hazardous wastes in landfills such as Emelle. As respondents observe (Sizemore Br. in Opp. 4), the hazardous wastes treated in surface impoundments are largely wastewater. On the other hand, the two types of treatment are in many respects similar. For example, surface impoundments are regulated under the Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*, and are required to have groundwater monitoring wells to determine whether any hazardous wastes leaking from the impoundments have contaminated the underlying aquifer. 40 C.F.R. 265.90. Thus, to the extent that the Base Fee is designed to compensate the State for monitoring costs and potential costs of clean-up, those interests are to some degree

⁹ Petitioner's argument that the Base Fee is discriminatory in effect was based upon the figures on hazardous waste that are described in the petition (Pet. 5 n.2). Furthermore, petitioner specifically referred to impoundments as hazardous waste facilities equivalent to commercial waste disposal sites.

implicated by the exempted surface impoundments. The Alabama statute does not explicitly distinguish between the two types of treatments, and respondents do not identify any other materials indicating that Alabama in fact relied on this distinction in enacting the Base Fee provision.

In light of this unresolved dispute over the appropriate categorization of surface impoundments, we submit that it would be premature for this Court to undertake on this record to define a standard for determining when a state tax with a disparate impact on like-kind in-state and interstate commerce unlawfully discriminates against interstate commerce. If petitioner's categorization of hazardous waste activities were to be upheld by the lower courts, and its allegation sustained that the State had "gerrymandered" its definition of a taxable event so as to exclude 98 percent of in-state commerce while including virtually all interstate commerce, the Base Fee probably should be deemed to discriminate in effect against interstate commerce within the meaning of this Court's tax precedents. There would seem to be little analytical basis for distinguishing between tax schemes with exceptions, offsets or credits for in-state activities and those in which the definition of the taxable event has been artfully drawn in the first instance to exclude comparable in-state activities. On the other hand, if the courts below conclude that surface impoundments are not comparable to landfills, it will be necessary to consider the relevance of that distinction to the legislative decision to impose the base fee only on commercial facilities, whatever the nature of their disposal facilities, particularly given the evidence of a legislative intent to limit interstate shipments.

In any event, the Alabama Supreme Court used the wrong test, that of *Pike v. Bruce Church, Inc.*, *supra*, to evaluate the constitutional validity of the Base Fee under the Commerce Clause. Therefore, as to question two of the petition, this Court should grant, vacate and remand for further consideration, under appropriate legal standards, of the validity of the Base Fee.

3. The final provision of Act No. 90-326 challenged by the petitioner is the Cap Provision, which limits the amount of waste that may be disposed of in any 12-month period. We submit that, subject to the limitations of the Due Process, Takings, and Supremacy Clauses, States have authority to impose non-discriminatory limitations on the quantities of wastes to be disposed of within their borders. The Cap Provision of Act No. 90-326, however, presents two substantial issues. First, as the circuit court recognized (Pet. App. 73a, 92a-93a), the benchmark period for determining the waste volume under the Cap Provision was affected by the discriminatory Additional Fee. A complete remedy for the effects of the impermissible Additional Fee should accordingly include some adjustment of the Cap Provision. Second, the Cap Provision contains authority for the Governor to waive the volume limitation if "necessary to protect human health or the environment in the state" or if necessary to allow the State to comply with its obligations to assure disposal capacity. Pet. App. 113a. If this waiver provision allows a waiver to respond to a public health or environmental emergency only in Alabama, it raises a substantial issue under the Commerce Clause of underinclusion. Cf. *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 791 n.14 (questioning constitutionality of a requirement that a certificate of need to construct a new facility may not consider out-of-state need).¹⁰

For both of the above reasons, we submit that the third issue presented in the petition requires further

¹⁰ Respondents suggest that the Cap Provision also permits the State "to provide for disposal of out-of-state waste it guaranteed in the regional agreements required under [The Superfund Amendments and Reauthorization Act, 42 U.S.C. 9604(c)(9)]" (Hunt Br. in Opp. 22).

The appropriate interpretation of this state statutory provision should be considered by the courts below in the first instance.

consideration by the courts below before it would be ripe for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted. As to the first question presented, the Court may wish to consider summary reversal. As to the second and third questions presented, the judgment below should be vacated, and the case remanded for further consideration under the proper legal standards.

Respectfully submitted.

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JANUARY 1992

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC.,
Petitioner,
v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA;
ALABAMA DEPARTMENT OF REVENUE; and
JAMES M. SIZEMORE, JR., COMMISSIONER OF THE
ALABAMA DEPARTMENT OF REVENUE,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Alabama

MOTION OF THE
AMERICAN IRON AND STEEL INSTITUTE,
AMERICAN PETROLEUM INSTITUTE,
CHEMICAL MANUFACTURERS ASSOCIATION,
EDISON ELECTRIC INSTITUTE, *ET AL.*,
MOTOR VEHICLE MANUFACTURERS ASSOCIATION,
NATIONAL ASSOCIATION OF MANUFACTURERS, AND
NATIONAL ASSOCIATION OF METAL FINISHERS
FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND
BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION

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October 21, 1991

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FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE***

Pursuant to Rule 37.2 of the Rules of this Court, the American Iron and Steel Institute ("AISI"), American Petroleum Institute ("API"), Chemical Manufacturers Association ("CMA"), Edison Electric Institute, *et al.* ("EEI"),

Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA"), National Association of Manufacturers of the United States of America ("NAM"), and National Association of Metal Finishers ("NAMF") move for leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari. *Amici* are individual utilities and trade associations representing generators of hazardous wastes and polychlorinated biphenyls whose access to Chemical Waste Management's Emelle, Alabama disposal facility has been restricted by the actions of the State of Alabama that are the subject of this case. *Amici* request leave to file the accompanying brief to inform the Court of the significance of the restrictions at issue to a wide range of manufacturers and other industries throughout the nation. Counsel for Petitioner Chemical Waste Management, Inc. consented to the filing of this brief; consent of counsel for Respondents Governor Hunt, *et al.*, was requested but refused. AISI, API, CMA, EEI, MVMA, NAM, and NAMF therefore request leave to file the accompanying brief as *amici curiae*.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

Amici American Iron and Steel Institute (“AISI”),
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National Association of Manufacturers of the United States of America ("NAM"), and National Association of Metal Finishers ("NAMF") are non-profit trade associations. AISI's members include 40 domestic companies that account for approximately 80 percent of the raw steel production in the United States. API represents over 250 member companies engaged in all aspects of the petroleum industry, including exploration, production, refining, transportation and marketing. CMA's 180 U.S. member companies represent more than 90 percent of the production capacity of basic industrial chemicals within this country. MVMA's members are domestic companies engaged in the manufacture and sale of motor vehicles; they assemble 92 percent of the cars, trucks, and buses produced in the United States and operate more than 300 manufacturing facilities. NAM's members include over 13,000 companies and subsidiaries, employing 85 percent of all manufacturing workers and producing over 80 percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council. NAMF represents approximately 950 metal finishing companies throughout the United States.

Amici Edison Electric Institute, *et al.*, represent all segments of the electric utility industry. The Edison Electric Institute is the national association of investor-owned electric utility companies, the National Rural Electric Cooperative Association is the national association of rural electric cooperatives, and the American Public Power Association is the national association of publicly-owned utilities. These associations are joined by 63 individual electric utility companies (listed in the Appendix to this brief), which generate and distribute electricity to communities throughout the United States. Together, these individual utilities and the members of the three associations serve more than 95 percent of the nation's consumers of electricity.

Despite significant and successful efforts at waste reduction and recycling, many of the members of the *amici*

organizations generate hazardous wastes. Many have relied upon the permitted landfill facility in Emelle, Alabama ("the Emelle facility") owned by Petitioner Chemical Waste Management, Inc. for the secure disposal of hazardous wastes generated both in their production processes and in the cleanup of sites used in the past for waste disposal and handling. Some of these companies in the past also chose to gain an extra measure of environmental security by sending nonhazardous wastes to the Emelle facility, even though they were under no regulatory compulsion to do so. The Alabama law challenged in this case has made many member companies seek alternative disposal service or, where no adequate alternative is available, has significantly increased their disposal costs.

Some members of the *amici* organizations, in particular those representing the electric utility industry, also generate polychlorinated biphenyl ("PCB") wastes. PCBs have been used for many years in transformers, capacitors and other equipment required for transmission and distribution of electric power, because of their dielectric (non-conducting) and fire-resistant properties. Before Alabama adopted the challenged law, many of the *amici* shipped PCB wastes to the Emelle facility for disposal.

The outcome of this case will have a direct impact on *amici* members as hazardous waste and PCB waste generators. Allowing this law to stand will have economic consequences at all levels of the production chain and will potentially have an economic and competitive effect on the activities of the members of these associations.

INTRODUCTION AND SUMMARY

Amici support the constitutional challenges to Alabama Act No. 90-326 presented in the Petition for a Writ of Certiorari filed by Chemical Waste Management, Inc. This brief focuses in particular on the serious impact on interstate commerce of the discriminatory \$72 per ton "additional fee" imposed by the Alabama statute on wastes generated outside Alabama and treated or disposed of at the Emelle facility.

Alabama's discriminatory fees for out-of-state use of commercial hazardous waste treatment and disposal services located in the state have severely disrupted interstate commerce in these services. Not only is the Emelle facility an integral part of the existing interstate market for these services, but if this Court allows the decision of the Alabama Supreme Court to stand, other states almost certainly will follow Alabama's lead and impose similar restrictions on access to treatment and disposal services within their borders by out-of-state waste generators.

Restrictive measures such as those adopted by Alabama cannot be justified by any purported environmental risk nor as a matter of purely local interest. Hazardous wastes or PCB wastes generated in Alabama are chemically and physically indistinguishable from those generated in other states. Alabama's claim that wastes generated in other states are produced solely for the benefit of the citizens of those states also ignores the interdependence of the states in the national economy. Not only do numerous out-of-state waste generators produce goods that are used by and for the benefit of Alabama residents, but Alabama generators avail themselves of waste treatment and disposal services in other states. Thus, a Balkanized market for hazardous waste and PCB treatment and disposal services is just as inimical to the Commerce Clause as would be a Balkanized market for coal, natural gas, agricultural products, or any other natural or manufactured product.

Moreover, because hazardous waste and PCB treatment and disposal services are today integral to the manufacturing processes that generate these wastes, disruption of interstate commerce in these services directly affects interstate commerce in a wide range of other commodities. One of the major achievements of the environmental movement over the past few decades has been the recognition, on the part of industry, government, and society at large, that the minimization, management, and secure disposal of industrial wastes is as much a part of the manufacturing process as is obtaining fuel, raw materials, and labor. Industrial wastes—particularly hazardous wastes and PCBs—

cannot be randomly dumped or buried. Instead, proper waste treatment and disposal services must be provided or purchased as an integral component of the overall manufacturing process.

A sophisticated market, involving significant interstate exchanges, has developed to meet the demand for these services. Economic and environmental factors combine to make this market interstate in nature. To site in each state each of the numerous types of facilities required to provide the treatment and disposal services necessary today would be economically inefficient and impractical. In addition, due to geology and other environmental limitations, the 50 states are not equally suited for the siting of each type of facility needed by U.S. industry.

To avoid the existing and potential economic disruption that flows from the Alabama Supreme Court's decision, *amici*, representing a wide array of U.S. industry, respectfully urge this Court to grant the petition and reverse the decision of the Alabama Supreme Court.

REASONS FOR GRANTING THE PETITION

I. THE MARKET IN HAZARDOUS WASTE AND PCB TREATMENT AND DISPOSAL SERVICES IS INTERSTATE IN NATURE.

As a practical matter, stringent federal regulatory schemes promulgated to protect against the potential risks associated with the treatment and disposal of hazardous wastes and PCBs influence the character of the market for waste treatment and disposal services. These schemes dictate that U.S. industry employ a wide variety of sophisticated technologies, which for economic and environmental reasons cannot all be provided within each of the 50 states. Therefore, the market today for hazardous waste and PCB treatment and disposal services, in which the Emelle facility is a vital element, is an interstate market.

A. Federal Regulation Of Hazardous Waste And PCB Treatment And Disposal.

1. Regulation of Hazardous Wastes Under the Resource Conservation and Recovery Act.

The treatment and disposal of discarded industrial materials that have been classified as "hazardous waste"¹ is regulated by the United States Environmental Protection Agency ("EPA") under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 *et seq.* Under Subtitle C of RCRA, EPA has promulgated a "cradle to grave" system that regulates the transportation, storage, treatment, and disposal of hazardous waste. Specifically, subject to a few narrow regulatory exceptions, hazardous wastes may be stored on-site in unpermitted facilities for only a limited period of time; may be transported only by registered hazardous waste transporters; and may be stored, treated and disposed of only at permitted facilities. To obtain a RCRA permit, a facility must meet stringent siting, design, and operating requirements.²

In addition to the stringent baseline requirements of RCRA Subtitle C, another vital factor influencing the market for hazardous waste treatment and disposal services is the RCRA Land Disposal Restrictions program. Pursuant to the Hazardous and Solid Waste Amendments of 1984,³ EPA has issued regulations requiring that, before land disposal, most hazardous wastes must be treated to a level, or by a method, prescribed by EPA that reduces

¹ A hazardous waste is any solid waste that either (1) has been specifically listed by rule as a hazardous waste, or (2) exhibits one of several characteristics of hazardous waste that have been defined by rule. See 42 U.S.C. § 6921; 40 C.F.R. Part 261.

² For example, under EPA's regulations, a hazardous waste landfill must employ technological measures aimed at protection of groundwater resources, including synthetic membrane liners, leachate collection systems, and groundwater monitoring networks. See 40 C.F.R. §§ 264.97, 264.301.

³ Pub. L. No. 98-616, § 201, 98 Stat. 3221, 3226-33 (1984) (codified at 42 U.S.C. § 6924).

the toxicity or mobility of hazardous constituents. See 40 C.F.R. Part 268; 42 U.S.C. §§ 6924(d), (e), (g) & (m). EPA has promulgated its RCRA hazardous waste treatment standards based upon the Best Demonstrated Available Technology for each waste. See, *e.g.*, 55 Fed. Reg. 22520, 22524-25 (June 1, 1991).

Two important results follow from this waste treatment program. First, although the amount, toxicity or mobility of hazardous wastes are reduced by the prescribed treatment, virtually every treatment process ultimately produces *some* residue that must—and legally may—then be land disposed in a facility with proper authorization under Subtitle C of RCRA. For example, many hazardous wastes must be treated by high-temperature incineration; the ash that results is almost always itself classified as a hazardous waste. Therefore, the need for permitted landfill facilities, such as the Emelle facility, continues. Second, because of the wide variety of hazardous wastes produced in this country and EPA's efforts to identify the best treatment technology for each waste, a host of different technologies are necessary today to meet the needs of U.S. industry.⁴

Treatment and disposal facilities with the requisite operating authorization under Subtitle C of RCRA are scarce. There are, for example, only 20 commercial landfills in the country that can lawfully dispose of hazardous wastes and even fewer permitted commercial hazardous waste incinerators. Thus, waste generators in many states have no choice but to use treatment and disposal services in other states. Because the Emelle facility is the largest permitted landfill in the country, and because its hydrogeological setting is particularly well-suited for landfill operations, this facility has been widely used by generators seeking to ensure that their hazardous wastes are securely and lawfully disposed.

⁴ The RCRA hazardous treatment regulations, which are subject to revision and expansion, are currently based on 29 different technologies. See 40 C.F.R. § 268.42, Table 1.

2. Regulation of PCBs Under the Toxic Substances Control Act.

Polychlorinated biphenyls ("PCBs"), while not classified as hazardous wastes under RCRA, also require specialized treatment and disposal facilities. PCBs were once used for a variety of purposes, but most extensively in transformers and other electrical equipment. The manufacture of PCBs was essentially banned by Congress as of 1978, and the phaseout and disposal of PCBs in use at that time is regulated by EPA under section 6(e) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2605(e); *see also* 40 C.F.R. Part 761.

EPA's TSCA regulations require that PCBs and articles containing PCBs above certain concentrations (such as drained transformer carcasses or soils in which PCBs have been spilled) be disposed of in incinerators or landfills approved by EPA. 40 C.F.R. §§ 761.60-761.79. Nationally, only seven incinerators and eight landfills, including the Emelle facility, are approved for disposal of electrical equipment that contained PCBs or other PCB wastes. Of the eight landfills, only two are east of the Rocky Mountains.⁵ Many of the *amici*, particularly the electric utility industry, are presently facing a severe shortage of PCB disposal capacity, a problem exacerbated by an EPA regulation that requires PCB wastes to be disposed of within one year after being placed into storage for disposal.⁶

3. Treatment and Disposal of Hazardous Wastes and PCBs from Site Cleanups.

Another element that has created a need for an interstate market in waste treatment and disposal services is the need to treat and dispose of materials removed during

⁵ The EPA-approved PCB landfills are in Alabama, New York, California, Idaho, Nevada, Oregon and Utah (two facilities).

⁶ 40 C.F.R. § 761.65(a). However conscientiously these generators take their regulatory obligations, they risk substantial penalties for noncompliance if disposal capacity shortages force them to violate the one-year deadline.

cleanups of sites at which hazardous wastes or PCBs were handled or disposed of in the past. In 1980, Congress reacted to the problems caused by certain past waste handling and disposal practices by enacting the Comprehensive Environmental Response, Compensation, and Liability Act (known as "CERCLA" or "Superfund").⁷ This statute created a mechanism by which EPA can either compel the cleanup of sites that pose a threat to the environment or clean up those sites itself. 42 U.S.C. §§ 9604, 9606. In addition, RCRA requires an applicant for a facility permit to undertake corrective action with regard to any release of hazardous wastes or constituents from existing waste management units at the facility. 42 U.S.C. § 6924(u).

Many materials removed from sites being remediated voluntarily or under CERCLA or RCRA must be treated and disposed of in full compliance with EPA's RCRA and TSCA rules. While some of these wastes are managed on-site, many are sent to commercial treatment and disposal facilities. These wastes impose a substantial additional burden on the nation's limited hazardous waste and PCB treatment and disposal capacity.⁸

B. The Interstate Nature Of The Market For Hazardous Waste And PCB Treatment And Disposal Services.

A substantial interstate market for the treatment and disposal of hazardous wastes and PCBs currently exists. Approximately 250 million tons of hazardous wastes are generated annually in the United States.⁹ In 1987, before the RCRA treatment program was fully effective, approximately 3.7 million tons were shipped between states for

⁷ Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601 *et seq.*).

⁸ *See, e.g.*, 55 Fed. Reg. 22520, 22631-50 (June 1, 1990) (variance from RCRA treatment program based on lack of available treatment capacity for certain wastes).

⁹ National Solid Wastes Management Association, "Interchange of Hazardous Waste Management Services Among States," at 4 (1990) ("NSWMA Study").

treatment and disposal.¹⁰ The need for specialized services to comply with the RCRA treatment program, as well as new regulations limiting the burning of certain hazardous wastes in industrial boilers and furnaces,¹¹ has likely increased the volume of wastes requiring interstate access to treatment and disposal services.

A recent study revealed that, in 1987, an average state sent hazardous wastes to 19 states and received hazardous wastes from 19 states. NSWMA Study, *supra* note 9, at 8. Industries in an average state utilized 12 different types of waste treatment or disposal services located in other states. *Id.* The study also reveals that even Alabama, although it is a net importer of hazardous wastes (receiving waste shipments from 37 states), sends significant amounts of hazardous wastes out-of-state. *Id.* at 22. Specifically, in 1987, Alabama generators sent 52,000 tons of waste to treatment and disposal facilities in 23 other states. Thus, Alabama industries are taking advantage of the interstate market in treatment and disposal services at the same time Alabama is restricting the access of out-of-state generators to one of the most important elements of that market.

Like these Alabama industries, many *amici* member companies are substantial consumers of interstate hazardous waste and PCB treatment and disposal services. For example, EPA's treatment standard for electric arc furnace dust (a waste produced by the steel industry) is based on high temperature metals recovery. See 56 Fed. Reg. 41164 (Aug. 19, 1991). This technology is available at only a handful of facilities. Further, many of the major steel-producing states, such as Illinois, West Virginia, and Michigan, contain no facility capable of treating a number of

¹⁰ *Id.* at 15.

¹¹ See 56 Fed. Reg. 7134 (Feb. 21, 1991). This rule eliminates an exemption from EPA's RCRA regulations that had allowed certain hazardous wastes to be burned for energy recovery in boilers and industrial furnaces. Waste generators who have relied on this exemption must now either obtain permits (an arduous and costly procedure) or send their wastes to permitted facilities for treatment and disposal.

the hazardous wastes produced by steel plants. Therefore, steel producers in most states must rely on out-of-state treatment and disposal services.

Similarly, the petroleum refining industry requires access to hazardous waste treatment or disposal services, particularly incineration, that are available in only a limited number of states.¹² For example, California, which has approximately 30 oil refineries, has no commercial hazardous waste incineration capacity for refinery wastes. Moreover, the siting of any new hazardous waste incinerator in California is very difficult today because of stringent new restrictions on air emissions within the Los Angeles basin, and other obstacles under state law to facility siting throughout the state. Therefore, refinery wastes generated in California, as well as in a number of other states, typically must be shipped between states.¹³

In addition to the interstate market for commercial treatment and disposal services, a number of companies that operate their own hazardous waste treatment and disposal facilities have centralized the locations of technologies they must employ to comply with the RCRA treatment program.¹⁴ Sending all wastes of a certain type to

¹² In 1987, there were only 14 commercial hazardous waste incinerators in the United States. U.S. EPA Office of Solid Waste and Emergency Response, *The Hazardous Waste System* at A-2 (June 1987). Very few new facilities have begun operation since that time.

¹³ Information compiled by *amicus* API in 1990 indicates that at least 20 states containing refineries have no commercial facilities capable of treating refinery wastes.

¹⁴ Several steel companies, for example, have their own facilities capable of treating and disposing of hazardous wastes from plants in several states owned by the same company. One company has a tin recovery plant capable of processing tin plating wastes from a sister plant in another state. Another has an acid regeneration plant that processes waste acids from a sister plant in another state. In addition, several steel companies, each with plants in several states, are faced with limited commercial facilities that can perform high temperature metals recovery on electric arc furnace dust and are now considering building centralized plants to treat their own wastes.

one location is much more economical for these companies than building duplicative treatment or disposal facilities at each plant that generates a particular type of waste. This centralization often necessitates the interstate shipment of hazardous wastes between intracompany facilities.¹⁵

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE ALABAMA'S ACTIONS HAVE UNLAWFULLY DISRUPTED INTERSTATE COMMERCE IN HAZARDOUS WASTE AND PCB TREATMENT AND DISPOSAL SERVICES.

A. The Market For Treatment And Disposal Services Is And Must Remain Interstate In Nature.

Treatment and disposal services for hazardous wastes and PCBs today are as integral a component of manufacturing processes as supplies of energy or raw materials. Just as the U.S. economy could not run efficiently if manufacturers had to obtain all their raw materials from within their home states, so the U.S. economy cannot rely on a Balkanized system of hazardous waste and PCB treatment and disposal services. The market for these services is necessarily interstate because of the manifest inefficiency in replicating each necessary technology in every state and because states vary substantially in their suitability as locations for particular types of waste management facilities.

1. Replicating Every Needed Type of Treatment and Disposal Facility in Every State Is Economically Infeasible.

As discussed above, the RCRA hazardous waste treatment program forces industry to employ numerous different treatment and disposal technologies. This multiplicity of technologies is a direct result of the widely varying universe of hazardous wastes and EPA's regulatory identification for each waste of the technology that minimizes the toxicity or mobility of residues that must be land dis-

¹⁵ While the Alabama law challenged in this proceeding does not affect these transfers, other restrictions on interstate waste transfers could. See *infra* p. 16.

posed. Some of these technologies are used for a relatively small volume of wastes.

The quantity of wastes that must be treated or disposed of at any particular type of facility is generally insufficient to justify the high capital cost of constructing these sophisticated facilities in every state. Moreover, as in other industries, economies of scale make it inefficient to construct multiple smaller units. Just as requiring a manufacturer to obtain all of its fuel, semiconductors, steel parts, or other components strictly from in-state sources would seriously disrupt interstate commerce, so requiring a manufacturer to obtain all of its hazardous waste and PCB treatment and disposal services from in-state sources would seriously disrupt interstate commerce.¹⁶

2. Environmentally Suitable Sites For Treatment And Disposal Facilities Are An Unevenly Distributed Natural Resource.

A second reason that the market for hazardous waste and PCB treatment and disposal services is, and must be, national in scope is that states vary significantly in their suitability for siting the necessary facilities. For example, landfills generally are sited in areas that present the minimum possible chance for hazardous constituents to migrate into groundwater. The location of the Emelle facility is particularly well suited for hazardous waste landfill operations because it lies over hundreds of feet of highly impermeable chalk that would protect the underlying groundwater aquifer in the event that RCRA protective systems were to fail.¹⁷ In contrast, most of Florida is un-

¹⁶ As a practical matter, in addition to economic and environmental constraints, the time required to obtain the necessary permits to construct new hazardous waste management facilities, substantial public opposition to their siting, and even some state-wide moratoria on their siting, such as that recently adopted by Texas (see 22 Env't Rep. (BNA) 347 (June 14, 1991)), make it virtually impossible to duplicate all treatment and disposal options within each state in the foreseeable future.

¹⁷ Environmental considerations also influence waste generators' choices among alternative treatment and disposal services, because of their desire to avoid future liability under CERCLA.

suitable for a hazardous waste landfill because the underlying rock is highly permeable and the water table is high. Similarly, deep well injection (another hazardous waste disposal technology) requires specific geological conditions that are found in only a few areas, while restrictions on air emissions increases imposed by the 1990 Clean Air Act Amendments effectively limit those areas where new hazardous waste incinerators can be sited.

Environmentally suitable locations for hazardous waste and PCB treatment and disposal facilities, therefore, are valuable natural resources just like concentrations of coal, iron or natural gas. This Court has repeatedly rejected attempts by states to reserve their natural resources for in-state users:

If the states have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. . . . If one state has it, all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines.

West v. Kansas Natural Gas Co., 221 U.S. 229, 255 (1911).¹⁸ Alabama's attempt to reserve its valuable waste disposal resource for in-state users should similarly be invalidated.

B. The Rationale Of The Alabama Supreme Court Now Restricts Interstate Commerce And Would Seriously Distort Interstate Commerce In Hazardous Waste And PCB Treatment And Disposal Services If Adopted By Other States.

The Alabama law at issue in this case has caused many of the *amici* members to incur significantly higher costs,

¹⁸ See also, e.g., *Sporhase v. Nebraska*, 458 U.S. 941 (1982) (unlawful restriction on export of groundwater); *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982) (unlawful restriction on export of hydroelectric power); *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (unlawful restriction on export of minnows); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978) (unlawful reservation of solid waste landfill capacity).

or to reduce their hazardous waste and PCB shipments to the Emelle facility and find other options for disposal. The resulting decline in shipments to Emelle has increased the demand for landfill capacity in other states and exacerbated the pre-existing shortage of available disposal facilities. Generators of PCB wastes in particular, such as the electric utility and steel industries, are facing an extreme shortage of capacity.

Even more serious than the effects of Alabama's restrictions on access to the Emelle facility will be the consequences when other states inevitably follow Alabama's lead.¹⁹ A number of other states have already adopted,²⁰ or are on the verge of adopting,²¹ measures to restrict access by out-of-state generators to treatment and disposal services within their borders. If the decision below is not reversed, these states and others will likely emulate Alabama and impose discriminatory fees or other restrictions that effectively limit or ban out-of-state wastes.²² In that event, many companies either will have no access to the hazardous waste treatment and disposal services necessary to meet their obligations under RCRA and TSCA or will have to pay exorbitant fees for these services, placing them at a competitive disadvantage in relation to companies in states that have such facilities.

¹⁹ See *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639 (1973) (considering cumulative impact of others following challenged action in determining federal preemption claim).

²⁰ Considerable litigation has resulted from these actions. See, e.g., *Chemical Waste Management' Inc.'s Petition for Certiorari* at 15-17 & n.8.

²¹ Legislation is currently pending in at least eight states (Arizona, Colorado, Kentucky, Louisiana, Nevada, New Jersey, Ohio, and South Carolina) to restrict the ability of in-state facilities to accept hazardous wastes generated out-of-state.

²² See, e.g., *Inside E.P.A. Weekly Report*, August 30, 1991, at 12 (discussing recommendation of National Governors' Conference that states should be authorized to ban imports of out-of-state wastes); *N.Y. Times*, Sep. 8, 1991, § 4, at 5 (New York, Louisiana, and Alabama discouraging hazardous waste imports through caps and high taxes.)

Even the intra-company waste transfers described above, *supra* p. 12, while not covered by the Alabama law, will likely be affected. For example, New York has already begun imposing restrictions on receipt of out-of-state wastes through individual facility permits, which are applicable to both commercial and in-house facilities.²³

Restrictions on access to permitted treatment and disposal facilities also drive up the costs of remediating sites, thereby discouraging voluntary cleanup efforts, decreasing the cost effectiveness of expenditures from the Superfund, and increasing the potential liabilities of U.S. industry and governmental units under CERCLA and RCRA. These increased costs not only will ultimately be reflected in the cost of affected manufacturers' products, but also will likely produce a serious environmental cost by slowing the pace of site cleanups.

Accordingly, the challenged Alabama law has serious national ramifications that require intervention by this Court. The in-state favoritism and economic Balkanization fostered by the Alabama Supreme Court decision is precisely the evil at which the Commerce Clause is aimed.²⁴

III. THIS COURT SHOULD GRANT CERTIORARI BECAUSE RESTRICTING INTERSTATE COMMERCE IN TREATMENT AND DISPOSAL SERVICES ADVERSELY AFFECTS INTERSTATE COMMERCE GENERALLY.

If not reversed, the Alabama Supreme Court decision will likely have deleterious effects on interstate commerce extending well beyond the effects on the interstate market

²³ See 21 Env't Rep. (BNA) 1179 (Oct. 19, 1990).

²⁴ See, e.g., *New Energy Co. v. Limbach*, 486 U.S. 269 (1988) (unlawful tax credit favoring ethanol manufactured in-state); *American Trucking Ass'n v. Scheiner*, 483 U.S. 266, 280-81 (1987) (unlawful tax on out-of-state trucks); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (unlawful tax exemption for liquor produced in-state); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978) (unlawful ban on out-of-state solid waste).

in hazardous waste and PCB treatment and disposal services described above. First, because these services are an essential component of industrial processes, restrictions on their use grant substantial competitive advantages to industries located in states with adequate treatment and disposal capacity while disadvantaging industries located in states without such capacity. Second, the rationale used by the Alabama Supreme Court to justify its decision could be extended to justify taxes on out-of-state consumption of other commodities, particularly scarce natural resources.

A. Balkanizing The Market For Hazardous Waste And PCB Treatment And Disposal Services Would Seriously Disrupt Interstate Commerce In A Wide Range Of Goods And Services.

Because hazardous waste and PCB treatment and disposal services are an integral component of most industrial and manufacturing processes, disruption of the interstate market in such services has ramifications beyond the waste management industry. The resulting increased cost or restricted supply of these services ultimately will increase the costs of products manufactured in states that lack adequate in-state treatment and disposal capacity. Industries in these states will have great difficulty maintaining competitiveness and some could even be forced to shut-down because of a lack of access, on an economical basis, to this necessary service. At the same time, industries in states that have treatment and disposal facilities adequate to meet in-state needs would be economically favored over out-of-state competitors through preferential access to this vital resource.

Alabama's effort to portray its law as a matter of purely local concern ignores the interdependence of the national economy and the integral relation of hazardous waste and PCB treatment and disposal services to that economy. Contrary to Alabama's view, the wastes sent to the Emelle

facility from other states are not produced solely for the benefit of out-of-state residents.²⁵

Some of those wastes are generated either in the manufacture of final products used by Alabama citizens or in the production of intermediate products used by Alabama industries. For example, a metal plating company located in Georgia receives parts from a company in Alabama, plates the parts in Georgia, and returns them to the Alabama company for further processing and distribution in interstate commerce. In the plating process, the Georgia company generates hazardous wastes.²⁶ Before the challenged law took effect, the company disposed of these wastes at the Emelle facility because no commercial hazardous waste landfills exist within Georgia. Faced with the discriminatory fee, the plating company diverted its wastes to a facility in South Carolina. If South Carolina and other states that contain facilities suitable for disposal of this waste follow Alabama's lead, the Georgia plating company will not be able to compete effectively with plating operations within those states. Similarly, many other industries may find it impossible or prohibitively expensive to operate if access to vital waste treatment and disposal services is further restricted by other states.

B. The Alabama Supreme Court's Rationale Could Be Extended To Justify Discriminatory Taxes On Other Commodities.

The principal rationale adopted by the Alabama Supreme Court—that Alabama residents should be compensated for risks posed by wastes from other states—could be used to

²⁵ Ironically, a company located in Alabama manufactured half of the PCBs ever produced in the United States. *Chemical Waste Management, Inc. v. Alabama Dep't of Revenue*, Civil Action No. CV 90-1098 (Cir. Ct. Montgomery Co., Ala. 1990), Tr. 167 (testimony of Roger Henson). Nevertheless, Alabama is now attempting to limit the disposal within Alabama of those very PCBs.

²⁶ As another example, Alabama residents consume billions of gallons of petroleum products (e.g., gasoline and fuel oil) each year, almost all of which comes from processes that generate hazardous wastes outside the state. See *National Petroleum News—1991 Fact Book*, vol. 83, no. 7.

justify similarly disruptive taxes on other commodities. The Alabama Supreme Court justified the discriminatory fee on the ground that it protects Alabama citizens from the environmental effects of the disposal of wastes generated in other states. This parochial attitude ignores the plain fact—confirmed by the Alabama trial court—that hazardous wastes and PCB wastes generated outside Alabama are chemically and physically indistinguishable from those generated within Alabama and, therefore, pose no greater risk.²⁷ Even more unfairly, it disregards the costs, including environmental costs, associated with goods produced in other states and consumed by the citizens of Alabama. For example, in producing goods for an Alabama consumer, the Georgia plating company described above produces air emissions and water discharges that must be “borne” by Georgia residents. Indeed, most industrial processes produce air or water emissions, which under the logic of the Alabama Supreme Court could be said to “burden” local residents. Yet, their products typically are shipped throughout the nation to the advantage of all.

If the decision of the Alabama Supreme Court is not reversed, its rationale will allow states to tax products shipped out of state to compensate for these burdens. For example, states that produce coal, iron, natural gas, and other scarce raw materials could tax out-of-state shipments to compensate in-state residents for the environmental costs of extracting these materials. In-state users of these commodities would then gain a substantial competitive advantage over out-of-state users. Clearly, these taxes would have a deleterious effect on interstate commerce, yet they follow directly from the rationale adopted by the Alabama Supreme Court. To avoid these consequences, this Court

²⁷ *Chemical Waste Management, Inc. v. Alabama Dep't of Revenue*, Civil Action No. CV 90-1098 (Cir. Ct. Montgomery Co., Ala. 1990), reprinted in *Chemical Waste Management Petition for Certiorari* at 86a; accord, *National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management*, 910 F.2d 713, 720 (11th Cir. 1990), cert. denied, 111 S.Ct. 2000 (1991).

should grant certiorari to review and reverse the decision of the Alabama Supreme Court.

CONCLUSION

For the reasons stated above, Chemical Waste Management, Inc.'s Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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October 21, 1991

APPENDIX

APPENDIX

LIST OF ELECTRIC UTILITY AMICI CURIAE

American Electric Power Service Corporation
Appalachian Power Company
Atlantic City Electric Company
Baltimore Gas & Electric Company
Boston Edison Company
Carolina Power & Light Company
Centerior Energy Corporation
Central Hudson Gas & Electric Corporation
Central Illinois Light Company
Central Illinois Public Service Company
Central & South West Services, Inc.
Cincinnati Gas & Electric Company
Columbus Southern Power Company
Commonwealth Edison Company
Consolidated Edison Company of New York, Inc.
Consumers Power Company
Dayton Power & Light Company
Delmarva Power & Light Company
Duke Power Company
Duquesne Light Company
Florida Power & Light Company
Holyoke Water Power Company
Houston Lighting & Power Company
Illinois Power Company
Indiana Michigan Power Company

Indianapolis Power & Light Company
 Iowa Power & Light Company
 Iowa Public Service Company
 Jersey Central Power & Light Company
 Kansas City Power & Light Company
 Kentucky Power Company
 Madison Gas & Electric Company
 Minnesota Power & Light Company
 Monongahela Power Company
 Montaup Electric Company
 New England Electric System
 Niagara Mohawk Power Corporation
 Northeast Utilities Service Company
 Ohio Edison Company
 Ohio Power Company
 Ohio Valley Electric Corporation
 Oklahoma Gas & Electric Company
 Pacific Gas & Electric Company
 Pacificorp dba Pacific Power & Light Company and
 Utah Power & Light
 Pennsylvania Power & Light Company
 Philadelphia Electric Company
 Potomac Electric Power Company
 Public Service Company of Indiana, Inc.
 Public Service Electric & Gas Company
 Tampa Electric Company
 Texas Utilities Electric Company
 The Cleveland Electric Illuminating Company

The Connecticut Light & Power Company
 The Detroit Edison Company
 The Potomac Edison Company
 Toledo Edison Company
 Union Electric Company
 Virginia Electric & Power Company
 West Penn Power Company
 Western Massachusetts Electric Company
 Wisconsin Electric Power Company
 Wisconsin Power & Light Company
 Wisconsin Public Service Corporation

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Respondents.

**On Petition for a Writ of Certiorari to the
Supreme Court of Alabama**

**MOTION FOR LEAVE TO FILE BRIEF AS
AMICI CURIAE AND BRIEF OF AMICI CURIAE OF THE
HAZARDOUS WASTE TREATMENT COUNCIL AND THE
NATIONAL SOLID WASTES MANAGEMENT
ASSOCIATION IN SUPPORT OF PETITIONER**

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TREATMENT COUNCIL AND THE NATIONAL
SOLID WASTES MANAGEMENT ASSOCIATION
IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Hazardous Waste Treatment Council ("Treatment Council") and the National Solid Wastes Management Association ("NSWMA") move for leave to file the accompanying brief as *amici curiae* in support of the petition

for a writ of certiorari. Counsel for Petitioner Chemical Waste Management, Inc. consented to the filing of this brief; consent of counsel for respondents Governor Hunt *et al.* was requested but refused. The Treatment Council and NSWMA therefore request leave to file the accompanying brief as *amici curiae*.

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ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

The Hazardous Waste Treatment Council ("Treatment Council") is a national not-for-profit trade association having more than 60 member firms with operations in forty-eight states. Its members serve thousands of large and small customers in those states, providing serv-

ices, equipment and technology for the treatment, storage, recycling and disposal of hazardous waste generated by industry and agriculture. The technical services provided by Treatment Council members encompass the full range of hazardous waste management techniques and both established and emerging technologies—including incineration and other thermal destruction, reclamation, biological and chemical treatment, land disposal after pre-treatment, and hazardous site cleanups.¹ As explained below, Treatment Council members depend upon Petitioner's Emelle, Alabama disposal facility in various ways, and are directly affected by the Alabama legislation at issue here. These state laws prevent the efficient use of the Nation's limited resources for waste treatment and disposal by restricting artificially the transportation of such waste at state boundaries. Petitioner Chemical Waste Management, Inc. ("CWM") is not a member of the Treatment Council.

The National Solid Wastes Management Association ("NSWMA") is a not-for-profit trade association whose members are companies engaged in the waste management business. NSWMA consists of over 2,700 members engaged in the entire spectrum of waste management services. Pursuant to its bylaws, NSWMA is charged with protecting the interests of the waste management industry in the public and regulatory arena.² In particular, a

¹ The Treatment Council's Articles of Incorporation provide that among its purposes is:

To promote the protection of the environment through the adoption of environmentally sound procedures and methods of destroying and treating hazardous wastes and the proper management of residues.

² The By-Laws of NSWMA direct it to:

. . . assist governments, public agencies and private organizations in the development, refinement and . . . acceptance of new and approved practices and policies, including laws and regulations in the waste management field . . .

fundamental goal of NSWMA's advocacy program, as approved by its Board of Directors, is "to ensure adequate waste management capacity in North America."

Members of NSWMA are engaged in the business of transporting and disposing of hazardous waste in Alabama and in other states. Several of NSWMA's members are in the business of transporting hazardous waste into Alabama for disposal within that state. The Alabama legislation at issue here³ has a direct and adverse impact on the waste transportation, treatment or disposal activities of these members. Petitioner CWM is a member of NSWMA.

REASONS FOR GRANTING THE WRIT

I. THE ALABAMA LEGISLATION AT ISSUE IS SEVERELY DISRUPTING THE NATIONAL MARKETPLACE FOR HAZARDOUS WASTE MANAGEMENT SERVICES AND TECHNOLOGY

The market for the safe treatment and disposal of hazardous waste, as it has developed, is regionally and nationally integrated. For reasons of economy, efficiency and environmental protection, the treatment and disposal of hazardous waste frequently involves crossing state lines. The types of hazardous waste that require treatment and disposal are diverse, as are the technological means of dealing with the waste.⁴ It is axiomatic that *no*

³ Ala. Act. No. 90-326 (1990) (codified at Ala. Code § 22-30B-1.1 *et seq.*).

⁴ Because of the multitude of hazardous waste produced in our society, no single technology can treat or dispose of *every* type of waste. As a result, the national marketplace in this field necessarily involves the regular shipment of all types of waste across many state borders, to and from customers and facilities located in any states. See generally *National Solid Wastes Mgt. Ass'n v. Alabama Dep't of Env'tl. Mgt.*, 910 F.2d 713, 717 (11th Cir. 1990), *modified on other grounds*, 924 F.2d 1001 (11th Cir. 1991), *cert. denied*, 111 S.Ct. 2800 (1991); see also, *Hazardous Waste Treatment Council v.*

state possesses within its borders the means to dispose of *every* type of hazardous waste that even its own residents and industry generate. With respect to the treatment and disposal of hazardous waste, the states—and their businesses and citizens—truly are, and should be, interdependent.⁵

Economies of scale, market forces, geologic and other advantages affect the location and choice of facilities in any state, and the dispersion of facilities and technology among the states. It is far simpler and less costly to move hazardous waste 25 miles *across state lines* to the closest, most technically advanced and safest disposal facility, than it is to move it hundreds of miles *across the same state*. Thus, as this market has developed, hazardous waste frequently is moved across interstate boundaries—just as any other goods or services—to take advantage of the competitive national market in the provision of treatment and disposal services.⁶

South Carolina, 766 F. Supp. 431 (D.S.C.), *aff'd in part, remanded in part*, 1991 U.S. App. LEXIS 22154 (4th Cir. September 20, 1991).

⁵ A 1989 study prepared for the U.S. Environmental Protection Agency analyzed waste management “flow” in the South-Central states (which includes Alabama). That comprehensive study demonstrated that: (1) no single state in that region has within its borders sufficient “capacity” to treat and dispose of *all* types of hazardous waste; and (2) hazardous waste flows both *out of* and *into* each of those states. See *Generation and Capacity: A Profile of Hazardous Waste Management in EPA Region IV* (February 1989). For example, because Alabama does not have an “aqueous treatment” facility, industry located in that state must arrange for aqueous wastes to be shipped to Tennessee or some other state for proper treatment and disposal. See *National Solid Wastes Mgt. Ass'n v. Alabama Dep't of Env'tl. Mgt.*, 910 F.2d at 717 n.5.

⁶ Indeed, data provided by each of the states to the U.S. Environmental Protection Agency, pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. 9604(c)(9) (1988), demonstrates that the national market for the treatment and disposal of hazardous waste is integrated and interdependent because: (1) every state has businesses, agriculture and industry which “generate” a variety of

The existence of this national market meets a very particular national need. Because it is not economically or practically feasible to build treatment and disposal facilities capable of dealing with certain types of waste in *each* state, interstate transportation is unavoidable if waste disposal is to be safe. Moreover, an open national market contributes to the development of innovative technologies and advanced facilities that can best deal with the growing national problem of hazardous waste. That technological development is restrained by the creation of artificial limits on the market which any facility might serve—artificial limitations such as those represented by the closed or restricted borders of any given state.⁷ Such limitations thus frustrate Congress' desire to meet the growing national need for the development of safe and advanced treatment and disposal technology and capacity.⁸

The Treatment Council, NSWMA and their members—and the businesses and citizens which they serve—are adversely affected by state efforts to ban or restrict interstate commerce in hazardous waste in various ways.

such wastes; (2) EPA has established treatment standards for hundreds of types of hazardous waste and hazardous waste mixtures; (3) there are approximately 19 different treatment technologies available to accommodate the health and safety requirements unique to such wastes; (4) the capital costs for constructing and operating such technologies are high; and (5) as noted above, no single state has within its borders the full range or necessary “capacity” to treat and/or dispose of every type of waste. Thus, businesses and citizens located in almost every single state both export *and* import some hazardous waste for treatment and disposal. See *Interchange of Hazardous Waste Management Services Among States*, Environmental Information, Ltd. (December 1990).

⁷ For example, Petitioner's facility at Emelle, Alabama, which is the subject of this case, is one of only two facilities east of the Mississippi River that are permitted (under federal standards) to accept hazardous waste containing PCBs.

⁸ See, e.g., 42 U.S.C. § 6902(a) (1988); H.R. Rep. No. 1133, 98th Cong., 2d Sess. 80 (1984); 129 Cong. Rec. H 8896-8897 (daily ed. October 31, 1983).

For example, Treatment Council and NSWMA members located in several states receive materials generated in other states for treatment at their facilities, including materials received at disposal facilities (i.e. engineered, secured and permitted landfills) similar to the Emelle, Alabama facility. At the same time, some Treatment Council and NSWMA members do business with, and are customers of, petitioner's Emelle facility. These members treat and destroy hazardous waste (which *they* in turn, receive from out-of-state customers) before transporting the treated waste residue to Emelle for disposal. Thus, Treatment Council and NSWMA members depend on the free movement of hazardous waste across state lines (1) *from* their customers to their treatment and disposal facilities, and (2) *from* their treatment facilities to disposal facilities in other states, including the Emelle facility.⁹

In relying upon the benefits of unrestricted transport and trade within and among the states, Treatment Council and NSWMA members have enjoyed a right that is presumptively granted to all citizens and businesses and

⁹ The myriad of health and safety requirements under which Treatment Council and NSWMA members operate underscores the need for an integrated national economy in this field. As required by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. § 6924(d)-(m)), and EPA regulatory standards (40 C.F.R. Parts 260-268 (1990)), multiple treatment steps are necessary for waste or waste residue processed at several treatment facilities prior to ultimate land disposal. For example, metal plating waste containing both metals and organic cutting oils might go to a waste treatment facility (in one state) for removal of the oils through phase-separation or oil-water separation. The oils might then go to a solvent recycling facility or to a hazardous waste incinerator (in another state) for removal or destruction of the organic constituents. The inorganic treatment residues either from the recycling or incineration processes are transported to a third site (in another state) for "stabilization" of the metal-bearing residue and, finally, are shipped for ultimate land disposal in a permitted hazardous waste landfill such as Petitioner's Emelle facility.

which lies at the heart of the economic union upon which the domestic economy has long been premised. The issue presented by the instant petition is whether a state may erect barriers at its border to the flow of *this* commerce, as the State of Alabama has done by imposing discriminatory fees on *imported* hazardous waste. Those barriers prevent the efficient use of the Nation's resources.

In a "national economy filled with benefits and burdens," *Hazardous Waste Treatment Council v. South Carolina*, 1991 U.S. App. LEXIS 22154, at *35, Alabama seeks to avail itself of the benefits of the national economy, but divorce itself from the burdens. Alabama enjoys the benefits of open borders between its sister states—shipping and receiving the products of agriculture and industry that *create* the hazardous waste. Alabama nonetheless seeks to "stop the flow" of waste generated by industry and agriculture in *other* states which are sent to Alabama for treatment and disposal.

While few states are prepared to renounce the benefit of free interstate trade generally, several states, (such as Alabama and South Carolina), desire that hazardous waste *not* be brought into their state for treatment or disposal. See *Hazardous Waste Treatment Council v. South Carolina*, 1991 U.S. App. LEXIS 22154, at *32. This phenomenon is known as the "NIMBY" syndrome—"not in my backyard." *Id.* at *8. Although the need for safe and efficient hazardous waste treatment and disposal is widely acknowledged, many citizens would prefer that a treatment and disposal facility not be located nearby.

In the state and local political arena, the pressure to enact legislation keeping hazardous waste from some *other* state out of one's *own* state is virtually irresistible. See generally, *Hazardous Waste Treatment Council v. South Carolina*, 1991 U.S. App. LEXIS 22154, at *8. The inevitable result of such political pressure is the balkanization of the marketplace in waste treatment and disposal.

That balkanization is inconsistent with the premises of the national economic union in general, and with the special need for the integrated development of the nationwide hazardous waste management industry.

Thus, if the reasoning of the Alabama Supreme Court is correct in upholding the discriminatory laws at issue, then similar restrictions—whether in the form of a restrictive tax or otherwise—will soon be enacted, and must be sustained, in other states as well. The effect of such laws would be, as the Fourth Circuit recently noted, “catastrophic.” *Hazardous Waste Treatment Council v. South Carolina*, 1991 U.S. App. LEXIS 22154, at *36. Allowing Alabama to “preserve” available disposal capacity at the Emelle facility solely for the benefit of its own residents thereby shifts the burdens of treating and disposing “imported” waste to other states, which are, in turn, thereby pressured to enact their own laws protecting themselves from the burden of out-of-state waste. Consequently the decision below threatens a far reaching and severe disruption of the entire national marketplace for the treatment and disposal of hazardous waste.

II. THE DECISION OF THE ALABAMA SUPREME COURT REPRESENTS A CLEAR DEPARTURE FROM THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE

For nearly 200 years, it has been understood and accepted that the formation of the new national union was premised upon free trade between and among the citizens, businesses and industry of the states of the Union.¹⁰ The primary protection for that trade has been found in

¹⁰ The Constitution was founded on the idea that:

... in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979).

the Commerce Clause (U.S. Const. Art. I, § 8, cl. 3), as interpreted by this Court.

The Commerce Clause grants to Congress the power to regulate trade among the citizens of the states. It bars any state from placing its parochial interests above those of the national union by discriminating against and restricting the flow of interstate commerce. The guiding constitutional principle is that no state is permitted to discriminate against or interfere with interstate commerce. See generally *Hughes v. Oklahoma*, 441 U.S. 322; *Maine v. Taylor*, 477 U.S. 131 (1986); *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988); *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989). As a result, state laws that discriminate against interstate commerce are “routinely” held invalid. *New Energy*, 486 U.S. at 274. The standard for justifying discriminatory state laws or activities is extremely high, so high that a virtual *per se* rule of invalidity has been imposed by this Court, particularly with respect to statutes that embody a facial discrimination against interstate commerce. See *New Energy*, 486 U.S. at 278-79, citing *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); see also *Hughes v. Oklahoma*, 441 U.S. at 337 (facial discrimination by itself may be a fatal defect).

In *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), this Court dispelled any doubt whether there exists some implied exception to the principle barring state discriminations against out-of-state goods and services as it relates to the shipment of waste for treatment or disposal. There, New Jersey had sought to restrain the flow of waste entering the state, arguing that (1) the treatment and disposal of waste posed threats to the state’s environment and the “limited natural resources” available there for disposal; and (2) the available landfill capacity within its borders was threatened by the treatment and disposal of waste originating both from within the state and from out-of-state sources. Notwithstanding the apparent health

and safety purpose of New Jersey's law, this Court held that:

[I]t does not matter whether the ultimate aim of [the law] is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may be incidentally affected. But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.

Id. at 626-27.

Each of the Alabama laws at issue, particularly the \$72.00 per ton "additional fee" imposed on waste originating in any other state,¹¹ represents a form of economic discrimination barred by the Commerce Clause and by this Court's decision in *Philadelphia v. New Jersey*. By applying the \$72.00 per ton "additional fee" solely to "imported" waste, Alabama has expressly sought to inhibit the flow of waste for treatment and disposal at the Emelle facility, whose customers are located in dozens of states. Thus, it seeks to use the taxing power as a device to control the flow of commerce between the states, a result precluded by *Philadelphia v. New Jersey*. That Alabama has employed its taxing power to accomplish this goal does not excuse its unconstitutionality.

¹¹ The \$72.00 per ton charge discriminates on its face. The two other statutory restrictions at issue in this case simply mask Alabama's economic discrimination with neutral language. The difficult issues surrounding attempts to pierce such facially neutral impositions on commerce, where their pronounced discriminatory effect makes plain the discriminatory motives underlying such laws, presents an issue that warrants this Court's immediate attention.

See *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269; *Welton v. Missouri*, 91 U.S. 275 (1875). "[N]o State can, consistently with the Federal Constitution, impose upon the products of other States * * * more onerous public burdens or taxes than it imposes upon the like products of its own territory." *Guy v. Baltimore*, 100 U.S. 434, 439 (1879).

No legal justification for Alabama's discrimination can be founded on the character of the waste which crosses its borders. Waste shipped to the Emelle facility from outside Alabama—metals, solvents, oil, chemicals, and other waste—is not different from that generated within the state. See *National Solid Wastes Mgt. Ass'n v. Alabama Dep't of Env'tl. Mgt.*, 910 F.2d at 720; *Hazardous Waste Treatment Council v. South Carolina*, 1991 U.S. App. LEXIS 22154, at *21 ("hazardous wastes generated out-of-state pose no more threat to human health and the environment than hazardous waste generated" in state).¹²

Alabama's purported concern for the health and safety of its citizens is fully addressed by the extraordinary federal and state regulatory standards and processes which ensure that waste only can be transported for

¹² The Alabama Supreme Court did not take issue with the express finding by the trial court in this case that there was no relevant distinction between waste generated within Alabama and waste generated in other states. As found by the trial court, "hazardous waste generated in Alabama is just as dangerous as that generated in other states" (App. 86a), a holding consistent with the recent Fourth Circuit decision in this area. See *Hazardous Waste Treatment Council v. South Carolina*, 1991 U.S. App. LEXIS 2215, at *35. Moreover, this Court's decision in *Philadelphia v. New Jersey* makes clear that, given the unanimous findings of the lower courts on this issue:

... there is no basis to distinguish out-of-state waste from domestic waste. If one is inherently harmful, so is the other. Yet New Jersey has banned the former while leaving its landfill sites open to the latter.

437 U.S. at 629.

safe treatment and disposal.¹³ More to the point, any legitimate concern for health and safety can be satisfied by legislation requiring strict and effective treatment and disposal of any particular form of waste, *provided that such requirements apply evenhandedly and do not discriminate*—on their face or in their effect—on the basis of state of origin.

If some implied exception exists from the principles stated by this Court in *Philadelphia v. New Jersey*, the Alabama Supreme Court made no substantial effort to describe it. Indeed, the Alabama Supreme Court attempted to remove the laws at issue from the ambit of established Commerce Clause jurisprudence on the basis of the presumed health and safety objectives of the Alabama legislature. App. 20a. The Alabama Supreme Court thus attempted to reduce the constitutional prohibition on discrimination against interstate commerce to a prohibition on discrimination *motivated* by the desire to provide economic benefits to local industry. App. 19a. It equated this motive with the form of “economic protectionism” prohibited by the Commerce Clause. App. 20a.

Such a distinction ignores the clear holding of this Court in *Philadelphia v. New Jersey*, where the Court struck down the New Jersey law despite the unquestioned public policy objectives of that state in enacting the law. Whatever the “ultimate purpose [of the law], it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.” 437 U.S. at 626-27. The holding in *Philadel-*

¹³ See *Alabama v. United States Env'tl. Protection Agency*, 871 F.2d 1548, 1552 (11th Cir.), cert. denied, 110 S.Ct. 538 (1989) (“The regulations promulgated pursuant to the [Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq.] ensure that facilities disposing of hazardous waste do so in a manner consistent with eliminating health and environmental risks caused by the hazardous wastes”).

phia v. New Jersey applies “not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade.” *Maine v. Taylor*, 477 U.S. at 148-49 n.19; see also *New Energy*, 486 U.S. at 279 n.3 (purpose of state law to protect public health will not validate “patent discrimination against interstate commerce”). The “economic protectionism” prohibited by the Commerce Clause thus is not concerned with the state legislature’s general motive for acting in a particular field. What must be justified as “non-protectionist” is the *discrimination itself*.¹⁴ Where, as here, the only distinction between the waste is the place of origin, then there is “economic protectionism” of the type that the Commerce Clause forbids—regardless of the motivation of Alabama’s Governor and state legislators.

III. THIS CASE REPRESENTS A MATTER OF EXCEPTIONAL IMPORTANCE REGARDING THE INTEGRITY OF THE NATIONAL ECONOMIC UNION OF A KIND THAT WARRANTS THIS COURT’S ATTENTION

Beyond the clear departure from this Court’s Commerce Clause precedents represented by the decision below, certain additional factors make this case one that warrants issuance of a writ of certiorari.

First, as explained above placing a protectionist tax on its out-of-state customers restricts access to Petitioner’s Emelle facility. Given the national scope of the market in hazardous waste management services and the

¹⁴ It is “the *discrimination* [that must be] demonstrably justified by valid factors unrelated to economic protectionism.” *New Energy*, 486 U.S. at 274 (emphasis added). This is measured by a dual test. The discriminatory state law must meet a legitimate local purpose *and* the state must show that it cannot adequately serve that local purpose through “reasonable nondiscriminatory alternatives.” *Id.* at 278.

importance of the Emelle facility to that market, the ripple effects of this case will be felt in many states. Indeed, not only will the interstate flow of hazardous waste be affected and rechannelled, but other states will be forced to somehow manage the waste that Alabama has "rejected"—unless, of course, those states respond by adopting similar exclusionary laws.

Significantly, the citizens of those *other* states do not elect Alabama's Governor or state legislators or state judges, who are most sensitive to the local political forces which place them in office. Thus, it is very difficult for citizens of *other* states to convince Alabama's officials to overturn such discriminatory legislation. See *Nippert v. Richmond*, 327 U.S. 416, 434-35 (1946). Their only recourse is to convince their own state legislatures to adopt similar exclusionary laws. The immediate result is the balkanization of the national economic union. Thus, this is the type of case in which this Court's authority and duty to intercede is at its highest—to prevent a retaliatory, economic war between the states.

Second, the decision of the Alabama Supreme Court is in clear conflict with the decisions of several federal and other state courts.¹⁵ Indeed, given the decision of the Eleventh Circuit in *National Solid Wastes Mgt. Ass'n v.*

¹⁵ See *National Solid Wastes Mgt. Ass'n v. Alabama Dep't of Env'tl. Mgt.*, 910 F.2d 713 (rejecting prior Alabama attempt to ban imports of hazardous waste from certain states); *Hazardous Waste Treatment Council v. South Carolina*, 1991 U.S. App. LEXIS 22154 (South Carolina laws enjoined where they ban, restrict or impose quotas on the import of hazardous waste); *National Solid Wastes Mgt. Ass'n v. Voinovich*, 763 F.Supp. 244 (S.D. Ohio 1991), appeal pending, No. 91-3466 (6th Cir.) (Ohio fee on imported waste declared unlawful); see also *Illinois v. General Electric Co.*, 683 F.2d 206, 213-14 (7th Cir. 1982), cert. denied, 461 U.S. 913 (1983); *Washington State Building & Construction Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982), cert. denied, 461 U.S. 913 (1983); *American Trucking Ass'n v. Sect'y of State*, 1991 Me. LEXIS 148 (Me. June 17, 1991).

Alabama Dep't of Env'tl. Mgt., 910 F.2d 713, this conflict is particularly unseemly because there now exist *two* Commerce Clause standards *within* Alabama: discriminatory *non-tax* measures affecting imported hazardous waste are invalid (because they are subject to challenge in federal court); while discriminatory state *tax* measures regarding the same imported waste will be upheld because, under the strictures of the Tax Injunction Act, 28 U.S.C. § 1341, their constitutionality under the Commerce Clause may be challenged only in Alabama state court. Unfortunately, the same device—structuring a state's discrimination against the flow of waste in the form of a prohibitory tax, thus attempting to avoid federal court review—is available to every state legislature.

Third, as noted above, the issue presented by this case reflects a recurring nationwide concern. The NIMBY ("not in my backyard") syndrome associated with the treatment and disposal of hazardous waste is pervasive. Declarations by state officials that they will not allow their home state to become a "dumping ground" for the hazardous waste of other states reflect a politically expedient course. And the local pressure on state governors and legislators to enact laws that limit the flow of waste into their state is intensified when *other* states have enacted similar laws. There is direct pressure to retaliate against states that will not accept the imports of waste. Indeed, such direct retaliation—designed to force other states to change their policies—was evident in Alabama's earlier blacklisting of certain states (which Alabama felt were not living up to their responsibilities), see *National Solid Wastes Mgt. Ass'n v. Alabama Dep't of Env'tl. Mgt.*, 910 F.2d at 718, and in South Carolina's similar efforts to restrict the import of waste from North Carolina and other states. See, *Hazardous Waste Treatment Council v. South Carolina*, 1991 U.S. App. LEXIS 22154 at *17. The issue presented by this case thus is of widespread and immediate concern to many state legislatures

as well as industry. Those state legislatures that have refrained from enacting such laws in the past have presumably done so out of respect for clear constitutional principles. If Alabama is free to enact such discriminatory laws, then other states will not be restrained.

Fourth, the decision of the Alabama Supreme Court poses a very real health and safety threat. As the Fourth Circuit recently held, the efforts of various states to limit or bar out-of-state waste—reducing the available capacity to safely and effectively manage the waste—could cause some industries and citizens to return to the days of dumping waste illegally. *Hazardous Waste Treatment Council v. South Carolina*, 1991 U.S. App. LEXIS 22154 at *21. As such, more “Superfund” dumping sites may arise if permitted and regulated disposal capacity is removed from the national marketplace, thereby frustrating the health and safety goals of the federal regulatory scheme. *Id.* at *9.

The Treatment Council, NSWMA and their members are of the view that *all* discriminatory restrictions on the flow of this article of commerce are invalid. To allow any state to embargo or handicap the flow of commerce in this field would interfere with the development of technology that is essential to serve the Nation’s industrial and agricultural base. The need for rapid development of technology and expansion of treatment and disposal capacity—recognized by Congress as vital to meeting national requirements for the disposal of hazardous waste—would not be well-served by an extended retaliatory war between the states over the shipment of waste. Neither would that interest be well-served by even a brief period of parochially-sponsored, state-imposed embargoes on the transportation of waste for safe treatment and disposal. Therefore, this is an appropriate case for the Court’s review.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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October 21, 1991

JAN 9 1992

OFFICE OF THE CLERK

No. 91-471

IN THE

Supreme Court Of The United States

October Term, 1991

CHEMICAL WASTE MANAGEMENT, INC.,
Petitioner

v.

GUYHUNT, GOVERNOR OF THE STATE OF ALABAMA;
ALABAMA DEPARTMENT OF REVENUE; AND
JAMES M. SIZEMORE, JR., COMMISSIONER OF THE
ALABAMA DEPARTMENT OF REVENUE,
Respondents

**SUPPLEMENTAL BRIEF FOR THE RESPONDENT
GUY HUNT IN REPLY TO THE AMICUS CURIAE BRIEF
OF THE UNITED STATES**

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**SUPPLEMENTAL BRIEF FOR THE RESPONDENT
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 BRIEF OF THE UNITED STATES**

The Solicitor General is Appearing For a Client Agency.

The January 7 brief of the Solicitor General is **not** filed as a disinterested exposition on behalf of the greater, unrepresented public interest. It is clearly a statement of the parochial position of the Environmental Protection Agency.¹ As a result of Superfund cleanups, EPA is tradi-

¹Attached as an Appendix is a well balanced magazine article entitled, "The Hazardous Waste War", *Governing*, November, 1991. This provides an independent factual account of the problem.

tionally the largest customer or supplier of the hazardous waste landfill facility at Emelle, Alabama. EPA issued the hazardous waste permit for the Emelle facility and has since assisted the petitioner in making Emelle the world's largest hazardous waste commercial landfill. Toxic and deadly substances are being buried there in quantities never before assembled in one location.

Alabama's Legitimate and Well-Founded Concerns are Admitted.

The Solicitor General admits that the State of Alabama "plainly has legitimate and well-founded concerns" involving the "health, safety and welfare of its citizens", and that, as a consequence, "enjoys a large measure of legislative and regulatory authority over the Emelle facility under its traditional police powers." Brief for the United States as Amicus Curiae at 8 ("Brief"). Nevertheless, the Solicitor General contends the additional fee on out-of-state hazardous waste is not "necessary or appropriate." Brief at 9. He suggests Alabama's only remedy is to present those concerns to Congress. Brief at 11. Two points are submitted in reply.

The first is that the proposed remedy through Congressional action is illusory. Congress has done nothing. Should the decision of the Alabama Supreme Court be set aside, in all probability Congress will continue to do nothing. The votes are simply not there, due to the "NIMBY" syndrome existing in practically every one of the great majority of states which do not have a permitted hazardous waste commercial landfill.² The only way

²See the quoted comments of Linda W. Little, Executive Director of North Carolina's Waste Management Board that appear in the Appendix, *Governing*, supra, at A-7-A-8.

to obtain Congressional action is to have the non-complying states realize that differential fees as recommended by the National Governors' Association are a reality.

The second point in reply is that Congressional action is *not* necessary to approve differential fees. The admittedly legitimate "safety, health and welfare" concerns of Alabama for its citizens distinguish this hazardous waste problem from both the factual and legal contexts of *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).³ As the Solicitor General's brief notes, the Supreme Court of Alabama determined in this case that *City of Philadelphia* is "inapplicable in the context of hazardous waste disposal." Brief at 7.

The "Base Fee" and "Cap provision" are NOT Appropriate Issues for Review or Remand.

With respect to issues 2 (the "Base Fee") and 3 (the "Cap Provision"), the petitioner did **not** meet its burden of proof in establishing that under the evidence presented, any constitutional infirmity exists. In effect, the Solicitor General so concedes by arguing that a remand would be necessary on these issues. Further, the legislative findings and the extensive findings of fact by both courts below reflect that Act 90-326 goes well beyond the mere raising of revenue for the State of Alabama. The balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), is clearly the appropriate legal standard for review of such statutes.

³Inexplicably, the Solicitor General mentioned only "the greater environmental risks associated with hazardous waste" in asserting that *City of Philadelphia* is controlling. Brief at 12-13. No mention was made at that point in the Solicitor General's brief of the admittedly legitimate "safety, health and welfare" concerns. The omission is particularly significant in that cancer or other disease-caused deaths stemming from hazardous waste contamination cannot be later "reimbursed".

Summary Disposition is Inappropriate.

What is perhaps most objectionable is the Solicitor General's suggestion that this Court "may wish to consider summary reversal" of the differential or additional fee issue. Brief at 20. How can that be appropriate after (1) he admits that the State of Alabama has "legitimate concerns" for the "health, safety and welfare" of its citizens, (2) he admits that the issue here is a significant one,⁴ and (3) considering that his major authority is *City of Philadelphia*, a 14 year old divided decision of this Court concerning only solid waste (or garbage) in which, unlike the record in this case, there were no valid reasons for treating out of state waste differently?

Should this Court decide to grant the petition, a full review would be in order rather than a summary disposition. Not even the petitioner suggested otherwise. Perhaps the most serious deficiency resulting from the drastic curtailment inherent in a summary disposition would be the deprivation of the opportunity for other states and interested groups to submit briefs as amicus curiae, even though the Solicitor General was invited to do so.

⁴The full quote is, "More broadly, however, the struggle between petitioner and the State of Alabama does not stand alone on the legal landscape. Disposal of waste — whether solid, hazardous, or nuclear — has become an extremely controversial and divisive issue across the Nation". Brief at 7. Also, see the attached Appendix.

CONCLUSION

In any event, the unanimous decision of the Supreme Court of Alabama is well supported by this fact intensive record and by *Maine v. Taylor*, 477 U.S. 131 (1986). The petition should be denied.

January, 1992

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APPENDIX

GOVERNING,
The Magazine of States and Localities
November 1991

THE POISONOUS WAR
OVER HAZARDOUS WASTE

By Jonathan Walters

As with most siblings, North and South Carolina have had their rivalries, some dating back to when the colony of Carolina was carved in two in 1710. But it was a problem with a modern flavor—the disposal of hazardous waste—that made South Carolina Governor Carroll Campbell's blood boil.

He was furious about a state-by-state "environmental report card" released last summer by a major environmental consulting firm. It ranked the Palmetto State in the relatively dirty bottom 25 and put the Tar Heel State in the cleaner-and-greener top 25. Unfair, insisted Campbell. The reason for the disparity, he said, was that South Carolina had become the dumping ground for North Carolina's hazardous waste. Campbell went so far as to travel to Washington to see if he could persuade officials at EPA to pull some of North Carolina's Superfund money.

"North Carolina is a neighbor and a sister state," says Tucker A. Askew, Campbell's press chief. "The governors of the two states are friends, and yet we remain in pitched battle over North Carolina's intransigence and unwillingness to honor its own commitments to site facilities."

Indeed, the hazardous waste dumping issue has made for bad blood among a lot of states. Arizona, Idaho, Nevada, and Utah are all displeased with California for shipping millions of tons of hazardous waste to them. Ohio is unhappy with New Jersey, among others. Alabama has had it with nearly two dozen states, from Massachusetts to Mississippi.

Fueling this modern war between the states is the roughly 240 million metric tons of industrial solvents, dioxin, pesticides, acids, herbicides, PCBs, heavy metals and hundreds of

other toxic materials produced each year by farming, manufacturing and a wide variety of service industries. Disposal of the waste is the diciest, most divisive political issue to hit states and localities in decades.

The flash points are easy to spot: States that have traditionally acted as receptacles for other states' hazardous waste—Alabama, Louisiana, Ohio and South Carolina, among the leaders—are fed up and are starting to do everything in their power not to take it anymore, or at least not as much of it.

At some point last winter, Alabama officials believe Louisiana took over from Alabama the undesirable distinction of being the number one recipient of out-of-state hazardous waste. Louisiana's leap into the lead was no accident, however. It was the direct result of a policy adopted by Alabama to reduce the amount of hazardous waste flowing in.

Alabama has become much more militant in rejecting its traditional role as hazardous waste dump to the Southeast and the nation. Toward that end, the Alabama legislature in the summer of 1989 passed a tough two-tiered tipping tax on hazardous waste being dumped within its borders. Waste generated in-state would be taxed at \$40 a ton; out-of-state waste would be taxed at a whopping \$112 a ton.

The effect was immediate and profound. The flow of material into Chemical Waste Inc.'s Emelle, Alabama, hazardous waste site, the largest such dump in the country, quickly eased. The facility, which had handled more than 800,000 tons of hazardous waste the year before, received less than half that amount the following year.

Alabama officials are also pleased with the fiscal result—the \$30 million-plus from the tax that has so far poured into the state's general fund. Chemical Waste Inc. isn't so pleased; the company took the state to court over the tax. The Alabama Supreme Court ruled in the state's favor, but the company has appealed the case to the U.S. Supreme Court, charging that the tax violates the Commerce Clause of the U.S. Constitution, which the industry interprets as guaranteeing the unfettered flow of tainted trash as though it were a commod-

ity like any other—cars, food or television sets.

For the time being, however, the tax is accomplishing its main purpose: reducing the amount of hazardous waste coming into Alabama. "Nobody," says Ron Farley, associate general counsel with the Alabama Department of Environmental Management, "wants to be number one."

That goes for Louisiana, too, which disputes Alabama's assertion over its ranking and has passed taxes of its own on waste. Those taxes are also being challenged in court.

But ranking is really not the issue. The issue is which states are taking the nation's hazardous waste and which states are dishing it out. The issue is also whether those states that are handling more than their fair share are being adequately compensated for their trouble.

As of 1987, 15 states were net importers of hazardous waste and 35 were net exporters, according to the most recent data submitted to the U.S. Environmental Protection Agency under the federal capacity assurance plan program, which requires each state to assure EPA that it has a plan for handling its future hazardous waste disposal needs. There is no real geographic pattern to which states are importers and exporters, with the exception of the New England states, all of which are net exporters. (See map, page 35.)

Who imports and who exports was set (in stone, say some exporters) with the 1984 reauthorization of the federal Resource Conservation and Recovery Act, which put in place stringent standards both for how various types of waste would be handled (burned or buried, for example) and for the permitting of hazardous waste facilities.

The net importers think the net exporters are taking advantage of the importers' natural resources, possible environmental future, legal position, patience and goodwill. The response of exporters is now rote recitation: We are trying, they say, but tough siting standards combined with local opposition make it virtually impossible to establish new facilities. In fact, only one new disposal facility has gone on line since the 1984 RCRA reauthorization; all of the other current facilities

are the same ones that were operating then; they were granted interim permits under the reauthorization.

The issue of siting hazardous waste facilities is a tough one. Most state and local politicians—not to mention the hazardous waste disposal industry—do not want to invite the bruising local political battles that are invariably involved. "And as long as they don't have to, they won't," says E. Dennis Muchnicki, senior environmental policy adviser with the Ohio attorney general's office, which has been in the thick of some of the federal court battles over interstate bans on hazardous waste.

Virtually all efforts by net importers aimed at curbing the inflow of waste these days are at the same time aimed at putting pressure on net exporters to site facilities within their own borders—to force those politicians in other states to face up to the tough political fights involved.

To apply that pressure, importing states are pursuing several avenues. For one thing, they want the right to ban hazardous waste imports from selected states. Targeted would be states that produce substantial amounts of hazardous waste but that have made no effort to establish facilities, as well as states that have adequate disposal facilities within their borders but ship some hazardous waste out anyway (California, for instance).

Net importers also want Congress to sanction a clear right to impose a tax or surcharge on out-of-state hazardous waste, both to compensate the residents of the host state for accepting the stuff and to provide funds for expensive cleanups that may be down the road. Importing states also want the right to investigate and even inspect the source of out-of-state hazardous waste if they feel it necessary. Improperly labeled hazardous waste shipped into Ohio in 1984 killed a man when it caused an incinerator to explode.

So far, net importers have been mostly thwarted in their efforts, however. Alabama and South Carolina have in the recent past banned the import of hazardous waste from certain states, and the bans have been struck down for violating

the Commerce Clause. In fact, it was after the U.S. 11th Circuit Court of Appeals struck down Alabama's ban on hazardous waste from 22 states that the Alabama legislature swung right around and passed its two-tiered tax.

Through state permitting procedures, New York state has closed all its commercial hazardous waste facilities to waste from states that refuse to enter into reciprocal agreements to take toxic waste from New York, a policy that the waste industry is considering challenging in court. Texas had instituted a temporary moratorium on siting facilities; it expired last month.

The net-exporter states frequently mentioned as the worst offenders mostly admit to their failings. "We're the bad boys," says Linda W. Little, executive director of North Carolina's Waste Management Board. She offers the exporter's standard defense: Governor James G. Martin has been working hard with industry on siting a facility, but he has been thwarted thus far by local opposition. Massachusetts, considered to be one of the worst of the bad actors, has in the last 10 years chosen a half-dozen sites for a hazardous waste facility; its Department of Environmental Quality has shot down each one.

"Most of the state regulators that I talk to from the exporter states acknowledge that we and the other importing states have a legitimate concern," says Alabama's Farley. "They say they would like to address the fairness issue. But 'when' and 'how' are good questions."

What happened with North Carolina is illustrative. When Alabama passed its interstate ban, it made it clear that states showing at least some inclination toward dealing with their own hazardous waste would be taken off the list of the Forbidden 22. North Carolina—prominent on that list—quickly swung into action to develop a siting plan. But after the 11th Circuit Court decision, the sense of urgency seemed to evaporate and the plans languished. "My impression is that when the 11th Circuit ruled against us, it took pressure off North Carolina to do anything," Farley says.

Net importers do not blame state and local officials solely, however. The hazardous waste disposal industry is not much interested in siting new facilities, some state officials charge. Why invite the public relations hassle of siting new facilities when you can make money off the ones you have open already? "Industry doesn't want new facilities," says Ohio's Muchnicki. "They have a vested interest in running the old facilities into the ground."

That, the industry responds, is garbage. The industry would be happy to fulfill its role if states would only fulfill theirs, says Bob Eisenbud, Waste Management Inc.'s government affairs director. He thinks politicians and bureaucrats in states not pulling their waste disposal weight need to be more aggressive in their pursuit of sites and more helpful in the processing of site permits. "We don't like this situation where states default on pledges [to site facilities]. After all, we stand to be ones who site the facilities."

Some officials hope that EPA, through its authority to withhold Superfund money, will scrutinize states' capacity assurance plans and pressure the worst of the exporters to get serious about siting facilities. But EPA has shown little enthusiasm so far for doing so.

Withholding Superfund money would not work anyway, believes Frank Coolick, administrator of hazardous waste regulation for New Jersey, which imports about as much hazardous waste as it exports. "The question in the bad states is how to get the politicians to act responsibly. Do you think governors or legislators are going to take the heat if a state's Superfund money gets yanked? Absolutely not. They'll blame Frank Coolick and the agency; they'll say we submitted a bad capacity assurance plan."

Only one state, Colorado, has sited a disposal facility since the 1984 RCRA reauthorization. The landfill in a small town called Last Chance opened last July. The process took 10 years and involved lawsuits filed both by the owner of the site, Browning-Ferris Industries (which has since sold it to a new company) and by opponents of the facility.

The only other facility even close to reality (a reality that is still years away, however) is an incinerator and landfill proposed for Lind, Washington. It is being developed by Environmental Control Services Corp., which was started by former EPA Administrator William D. Ruckelshaus, who now heads Browning-Ferris.

Instead of the old-style "jam-it-down-their-throats" route, which simply does not work these days, Ruckelshaus decided to make proposals to localities, inviting them to solicit the facility. Lind got the nod on the strength of its location in the arid eastern part of the state and a 67 percent positive response to a local referendum on the siting proposal. Industry and public officials are watching the experiment closely.

In response to the growing impatience and militancy of net importers, governors and state environmental protection officials are beginning to face the equity issue, sort of. In the name of "lowering the current temperature of debate," says Oregon's Fred Hansen, chairman of a committee of state environmental department heads looking into the issue, environmental officials and the National Governors' Association have been working on a proposal that would put pressure on net exporters to act.

NGA's new proposal, approved last August without vocal dissent, calls for a federal policy allowing selective state bans on hazardous waste (mostly on waste coming from states that have the capacity to handle it themselves), and for specifically allowing Alabama-style differential tipping taxes.

But the waste handling industry is not happy about the prospect of 50 sets of rules, regulations and tax tables covering waste disposal, and is not likely to sit still for Congress's sanctioning of bans and vastly variable tipping taxes.

The governors' idea, currently, is to push their proposal as part of the reauthorization of RCRA, which is more than three years overdue. But that plan's chances are considered slim. The monolith that NGA might have appeared to be last August will likely quickly come apart on Capitol Hill if NGA's proposal actually starts showing promise. North Carolina says

as much: "If we had hazardous waste facilities in place in North Carolina, we would endorse the governors' proposal 100 percent," says Linda Little. "But right now we would be in the peculiar position of endorsing something that might hurt us."

Ultimately, most believe that Congress will have to step in and somehow even the playing field, or at least force the bad-actor states to act better. Proposals include passing a federal tipping tax, collected on interstate hazardous waste shipments and distributed among the net importers. Other pressure tactics would include pushing the EPA to withhold funds from hazardous waste generating states that fail to take more responsibility for dealing with their own flows. Or Congress might eventually go along with the NGA proposal.

In the absence of federal action, the hazardous waste issue portends to get hotter. Net importers promise to continue the guerrilla tactics they have been adopting with increasing frequency: bans, taxes, tough permitting requirements or even outright permitting moratoria. "If any state wants to be creative in banning stuff from coming in, they can find ways to do it," says Oregon's Hansen. "It may not hold up in court, but it takes three years for it to get knocked down. They can disrupt the system."

That's the plan, says Robert W. King Jr., South Carolina's assistant deputy commissioner for environmental quality control. "This issue is not going to go away. People feel they're not being treated equitably, and they're not. We will continually strive to balance this situation. We're not going to stop."

GOOD ACTORS, BAD ACTORS AND THE FINE PRINT

As the map shows, 15 states are net importers of hazardous waste and 35 are net exporters. But on closer examination, that simple picture gets more complex.

The figures were provided to the U.S. Environmental Protection Agency by the states under EPA's capacity assurance plan program. The numbers are old, however, dating back to 1987, and the status of some states—Colorado and New Jersey, for example—may have reversed since then.

Even when they were fresh, the numbers were considered suspect in some quarters. Some importing states charge that some exporting states fudged the figures in order to make it look like they were handling more of their own waste than they actually were.

Furthermore, the map is only a very general guide to which states are and are not pulling their hazardous waste disposal weight. A large handful of the states listed as net exporters—Alaska, Nevada, South Dakota, Vermont and Wyoming, for example—neither produce nor export very much hazardous waste, and so should not be condemned for not dealing with their own waste problems, net importing states acknowledge. A handful of states, including California, Massachusetts, North Carolina and Pennsylvania, are considered woefully and deliberately negligent.

While some state officials consider the capacity assurance plan numbers suspect, numbers compiled independently by EPA confirm the patterns outlined by the map. Those numbers, too, are old, however, also dating back to 1987. According to EPA's indepen-

dently compiled statistics, Pennsylvania exported more hazardous waste in 1987 than any other state, 333,000 tons; Ohio imported more than any other, 486,000 tons . But if the difference between waste imported and waste exported by states is calculated, Pennsylvania was not the worst offender, nor was Ohio the most beleaguered victim.

California led net exporters, shipping out 196,000 more tons of hazardous waste than it imported; Pennsylvania exported a net of 111,000 tons. Indiana led net importers with 289,000 tons of waste, while Ohio imported a net of 211,000 tons.

In the Supreme Court of the United States

OFFICE OF THE CLERK

OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC., PETITIONER

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA;
ALABAMA DEPARTMENT OF REVENUE; and JAMES M.
SIZEMORE, JR., COMMISSIONER OF THE ALABAMA DE-
PARTMENT OF REVENUE, RESPONDENTS

On Writ of Certiorari to the
Supreme Court of Alabama

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* The decision of the Supreme Court of Alabama and the decision of the Circuit Court of Montgomery County are set forth in the appendix to the petition for a writ of certiorari and have not been reproduced.

SUPREME COURT OF ALABAMA
SPECIAL TERM, 1991

1901043

GUY HUNT, as Governor of the State of Alabama

v.

CHEMICAL WASTE MANAGEMENT, INC.

1901044

JAMES M. SIZEMORE, JR., as Commissioner of the
Alabama Department of Revenue; and the
ALABAMA DEPARTMENT OF REVENUE

v.

CHEMICAL WASTE MANAGEMENT, INC.

1901106

CHEMICAL WASTE MANAGEMENT, INC.

v.

THE ALABAMA DEPARTMENT OF REVENUE, *et al.*

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1991	
April 5	Case docketed
April 16	CWM files cross appeal
June 13	Case argued and submitted
July 11	Opinion by Justice Shores issued; certificates of judgment issued

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

Civil Action No. CV 90-1098

CHEMICAL WASTE MANAGEMENT, INC., PLAINTIFF

v.

THE ALABAMA DEPT. OF REVENUE; JAMES M. SIZEMORE, JR., as Commissioner of the ALABAMA DEPARTMENT OF REVENUE; GUY HUNT, as Governor of Alabama; CLAUDE EARL FOX, M.D., M.P.H., as State Health Officer; and the STATE BOARD OF HEALTH, DEFENDANTS

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1990	
May 31	CWM files complaint challenging Additional Fee and Base Fee.
July 5	Defendants Sizemore and Alabama Department of Revenue file Answer to Complaint.
Aug. 13	Defendant Sizemore files Amendment to Answer.
Aug. 29	Defendant Hunt answers complaint and files counterclaim seeking determination of validity of Cap Provision.
Sept. 6	CWM files First Amendment To Complaint.
Oct. 3	CWM answers Defendant Hunt's counterclaim.
Oct. 15	Defendant Hunt files Amended Answer to Complaint.
Oct. 15- Oct. 18	Trial before Judge Phelps.
1991	
Feb. 28	Findings of Fact and Conclusions of Law, Order and Injunction filed.
April 2	Defendants Hunt and Sizemore file notices of appeal.

ORAL ARGUMENT ON MOTIONS

July 12, 1990

* * * *

[R. 309] BY MR. NETTLES: Yes, sir. So, what the State is saying, we want to do two things, and we'll go through the findings of fact but just—the Legislature, at least, and the Governor have said we have these concerns, very explicit concerns, four pages of them and we want to do two things; we are going to make it more expensive for people to send it in because we want to decrease the amount of waste coming in, one. And number two, have some money from what does come in, to help us with, among other things, Sumter county but also for the health department.

BY THE COURT: They said you need to treat the in-state people the same same way.

BY MR. NETTLES: That's right, but you don't. We are going back to Maine, we are also going back to several other cases that we cited in brief, and while we are staying on the law, let me refer back to the brief because there are other case as well, older cases that didn't deal with hazardous wastes.

BY THE COURT: Before I lose you on this, do you say, or does the Legislature say that these out-of-state users are using up a resource of Alabama?

[R. 310] BY MR. NETTLES: That's part of it, that's part of it, Your Honor. That this is a—they say it's one of the best—the Selma chalk is one of the best structures for the burial of this waste anywhere.

Now, there are a lot of other possible sites as well that are as good or better than, but those other sites have not been developed. Back in the late seventies, Emmelle was opened about four years or so, it was receiving this, and not much was said or done about it, and then it's just continued to grow, but it hasn't grown—hasn't been developed in other states.

Now, Your Honor can refer to the brief, you have the brief before you, if you would turn to page eight, and

this deals with a case, I believe it was Mr. Justice Scalia explaining the opinion of the court, and in that case, although he found against the government institution in that case, Limbach, who was Commissioner of Revenue, I think in Ohio, that he never,—the court, Mr. Justice Scalia explained, our cases leave open the possibility that a state may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose [R.311] that cannot be adequately served by reasonable non-discriminatory alternatives. Sort of like a products liability case.

BY THE COURT: You go back to Maine, I guess.

BY MR. NETTLES: Yes, sir. This is perhaps just another way of saying that what may appear to be a discriminatory or facially discriminatory provision in the Constitution that prohibits it, since that is a protectionist enactment, may on closer analysis may not be so. And that's what we say, you read those two cases together.

BY THE COURT: You say that this court has to look at the act and the purpose and look towards why.

BY MR. NETTLES: And the facts, yes, sir. What we are saying, like Mr. Justice Scalia, we are saying that our purpose cannot be adequately served by reasonable, non-discriminatory purposes. How can we discourage other people from sending their hazardous waste down here and and increasing the already four million tons of hazardous waste, without the total ban? But there's no other way to discourage them. Either a [312] total ban which might well be unconstitutional, or create problems for the entire country as well as Alabama, or with a tax.

BY THE COURT: As I understand the plaintiff's argument, for a rational,—a rational basis doesn't make any difference. The test says I am required to invoke is whether or not it's a different treatment, and if it is, the whys don't make any difference? Is that what he said?

BY MR. NETTLES: Yes, sir, but that's wrong.

BY THE COURT: I'll let you come back on that, but I understand the rationale is not properly before me.

BY MR. NETTLES: The rationale, Your Honor, is because of the—the scintilla, or whatever the substantial reason,—not scintilla, but the findings of the fact of the Legislature, the legislative findings as we set out, we cite two Alabama Supreme Court cases holding that legislative findings are entitled to weight.

BY THE COURT: Well, he says that doesn't make any difference. That if you tax an out-of-state user any amount at all more than you [R.313] tax an in-state user, it's per se violative of the Commerce Clause.

BY MR. NETTLES: Yes, sir, that's what I heard him say, too, and that's what the record will reflect and Mr. Justice Scalia says differently. If you read—

BY THE COURT: What kind of case was that?

BY MR. NETTLES: That was not a hazardous waste case, if I recall. It was something else, Your Honor.

BY THE COURT: If it was a hazardous waste case, you would recall it, right?

BY MR. NETTLES: Yes, sir, yes, sir. But it's good enough when you read with it the State of Maine, plus with the City of Philadelphia.

Your Honor, in other words, what we have here is a situation of has the Alabama Legislature advanced a legitimate local purpose that cannot be adequately served by reasonable, non-discriminatory alternatives.

* * * *

[R. 443]

LIST OF STATES AFFECTED BY ALABAMA ACT 89-788

States Not Affected by Act 89-788 Effective on Published Date	States Banned Because of Lack of Commercial Treatment or Disposal Facilities	Effective Date of Ban	States Banned Because of Lack of Response to Alabama's Request for Information	Effective Date of Ban
Arkansas	Alaska	09/14/89	Oregon	09/14/89
California	Arizona	09/14/89	Washington	09/14/89
Colorado	Delaware	09/14/89	U.S. Virgin Islands	10/19/89
Connecticut	District of Columbia	09/14/89		
Georgia	Florida	09/14/89		
Idaho	Hawaii	10/19/89		
Illinois	Kansas	09/14/89		
Indiana	Maine	09/14/89		
Iowa	Mississippi	09/14/89		
Louisiana	Missouri	09/14/89		
Kentucky	Montana	09/14/89		
Maryland	New Hampshire	09/14/89		
Massachusetts	New Mexico	09/14/89		
Michigan	North Dakota	09/14/89		
Minnesota	Puerto Rico	10/19/89		
Nebraska	South Dakota	09/14/89		
Nevada	Vermont	09/14/89		
New Jersey	Virginia	09/14/89		
New York	West Virginia	09/14/89		
North Carolina	Wyoming	09/14/89		
Ohio				
Oklahoma				
Pennsylvania				
Rhode Island				
South Carolina				
Tennessee				
Texas				
Utah				
Wisconsin				

Hazardous waste prohibited from banned states includes RCRA and CERCLA wastes.

The list of banned states has been revised to remove North Carolina from the banned list. The Governor of Alabama has signed an interstate agreement with the Governor of North Carolina. The agreement allows North Carolina to send hazardous waste to Alabama for land disposal.

Revised List Published: January 8, 1990

/s/ Leigh Pegues
LEIGH PEGUES
Director
Alabama Department of
Environmental Management

1-9-90
Date

Dec. [Illegible]

TESTIMONY OF RODGER HENSON

* * *

[Tr. 48] Q. Is there any difference among nonhazardous and hazardous waste based upon the state where they are generated or created?

A. There is no difference.

* * *

[Tr. 64] Q. I think we will pick up where we were at lunch. As I understand it, you had testified that you take hazardous waste and then solidify it or treat it and then render it nonhazardous before or when you place it into the trench; is that correct?

A. That is correct. That is with some waste.

Q. Possible with some waste, but not all waste?

A. Not all waste.

Q. And would you agree then with the statement that although some wastes degrade or can be less hazardous through treatment, some substances remain hazardous forever?

A. I would agree with that.

* * *

[Tr. 83] Q. And incidentally is it not correct that approximately 40,000 truckloads of hazardous waste came into Emelle last year?

A. I don't know if that is the number or not.

Q. If you take 20 tons on the average truck?

A. 20 tons a truck.

Q. 780,000, almost 800,000, and you multiply that out, would you get 40,000 truckloads of hazardous waste?

A. Is that how it divides out?

Q. Yes. We had a large complicated set of figures with Mr. Hanley, and that is what it came out.

A. If you take 780,000 tons of waste and divide that by 20 tons per truck you get the number of trucks.

* * *

[Tr. 102] Q. I will ask you to read with me on page 4, paragraph D, reading your lawyer's language, and you

will recognize the first few words of that, "Without the unconstitutional restrictions discussed above, the total annual demand for disposal capacity at the Emelle facility for hazardous waste generated out of state is projected to increase annually". Do you agree with that statement of your lawyers?

A. I agree.

Q. So, without the cap, without the additional fees, you project that total annual demand for disposing capacity there at Emelle would increase for hazardous wastes generated out of state annually?

A. To a point. There are some points somewhere in the future where it won't.

Q. I believe you stated in deposition that you see a hundred years of operation there at Emelle?

[Tr. 103] A. I stated in my deposition at the current rate I believe the facility would last 100 years, at least.

Q. Now, isn't it correct—I believe you said toward the end of your testimony this morning that with respect to—you were taking two situations, asked about what happens on cleanup costs. We see a lot of cleanup of hazardous waste from the government, Judge, or whoever mandates that it be removed, and a lot of that is coming to Emelle, is that correct?

A. Right.

* * *

[Tr. 113] Q. Now, is it not correct that you have monitoring facilities that will have to be maintained indefinitely, or shall we say forever?

A. Monitoring facilities?

Q. The 70 monitoring wells already in place at Emelle, for example?

A. Those wells will be monitored in perpetuity.

Q. Yes, sir. And that monitoring in perpetuity, by definition, will extend well beyond 30 years?

A. It will.

Q. And likewise is there not going to be a requirement that continued safety desirability, environmental

desirability factor to maintain the pumping out of the leachate and hauling, gathering, storing and disposal of leachate from this trench 19 and eventually trench 21, and from these other trenches yet to be built?

A. Yes, sir.

Q. And that gathering, collection, storage, transportation and disposal of leachate will have to be maintained in perpetuity?

A. Yes, sir.

Q. Again, by definition, beyond 30 years?

A. Yes, sir.

Q. And isn't it a fact that the premises there at Emelle [Tr. 114] where you have the monitoring, where you have the pumping out of leachate, will have to be maintained and secured in perpetuity?

A. Yes, sir.

Q. For which there will be some expense?

A. Some.

Q. In fact, all of those things that we have described, the continued monitoring, the continued pumping, the gathering and collection and hauling away and disposal of leachate, and the security maintenance of the facility will have to be maintained at some expense in perpetuity?

A. That's correct.

Q. Now, obviously you have some 50 acres in use at the present time, and assuming, shall we say, some annual increases and operations for a hundred years, you are talking about far more than 50 acres on down the road being placed in active operation?

A. Yes.

Q. And the greater the facility, the larger the facility, the larger the cost eventually in perpetuity?

A. That's correct.

Q. And is it not correct to say that the larger the facility the more millions of tons of hazardous waste brought in and left there forever, whatever risks there are likewise will increase?

[Tr. 115] A. Well, I get—when you talk about risks, what I am maintaining is that you are not increasing

your risk anymore by the more material that you bring in and put in the Selma chalk.

Q. That is your testimony?

A. Yes, sir.

Q. That you can dig another hundred trenches the size of trench 21 or trench 16, that we saw in the photograph, and not increase the risks?

A. It is my opinion you won't, because of the integrity of the chalk.

* * *

[Tr. 116] Q. So what we have here with the operation of this ChemWaste facility at Emelle and Selma chalk, all of this is based upon an inexact science?

A. In my view. The only thing that is inexact about it is the measurement of migration through chalk. You've got people that are saying 310 years it would take to penetrate the chalk. You have other people saying a million years, and you have people saying 10,000 years. It is somewhere in there somewhere, is what I am saying.

Q. It is going to leak?

A. The migration potential through that chalk is inexact.

* * *

[Tr. 120] Q. And ChemWaste has the responsibility should anything go wrong, it also has the similar responsibility for the present, certainly for the 30 years under the EPA guidelines, for anything that might go wrong in Louisiana, or at these other five facilities?

A. That's correct.

Q. So, if there were a natural disaster in Louisiana or Texas, or one of these other facilities, hazardous waste facilities, ChemWaste would be responsible for that; is that not correct?

A. If they own the facility, that's right.

Q. Yes, sir. Speaking of disasters, do you have any plan with respect to what if an earthquake comes through there?

A. No.

* * *

[Tr. 123] Q. Relating to this morning, I think you mentioned most of the Fortune 500 companies ship hazardous waste to the Emelle facility for landfill burial?

A. Many of them do.

Q. I think you said most.

A. I might have; most, many, some, a lot.

Q. Most and some, in any event let's just say with that, [Tr. 124] most, some, or a lot of Fortune 500 companies send to Emelle their hazardous waste. Most of those companies, most of that waste from those companies is generated outside of Alabama?

A. Yes, sir.

THE COURT: Excuse me. Is there a similar site in Alabama, a similar disposal site, to ChemWaste, to Emelle?

A. No, sir. We are the only commercial disposal site in the state.

THE COURT: You don't have an in-state competitor?

A. No, sir.

* * *

[Tr. 132] Q. Now, is Emelle the largest landfill, hazardous waste operation, anywhere in the entire country?

A. In land size, yes.

Q. And, in fact, do you know of any in the world as large as Emelle?

A. I don't. I am not familiar with every facility in the world.

* * *

Q. You are not aware of any landfill operation larger than the Emelle facility anywhere in the world; are you?

A. I'm not aware of any.

Q. During the video tape we heard—this is just to clarify—I think it said on the tape that the number of acres at Emelle was, I believe, 2400 acres, and your testimony [Tr. 133] was like 1700 acres?

A. No; it was 2700. We have acquired 300 more since the tape was made.

Q. You may have said 1700 but you meant to say 2700?

A. I meant 2700.

Q. That is the size of the Emelle facility?

A. (Witness nods head up and down.)

Q. One of the first things brought out in your testimony today was the location of Emelle. It is a rather rural area; isn't it?

A. It is.

Q. And this landfill is actually located between Emelle and Geiger?

A. That's correct.

Q. In this particular facility over there is that one of the reasons it was chosen, because it was a very sparsely populated area?

A. It was chosen because of geology, number one; and the second consideration was it was chosen because it was for sale.

* * *

[Tr. 156] Q. Would anything coming out of any one of those be considered leachate?

A. Yes. Materials pumped out of this pipe that is above both of the liners would be considered leachate.

THE COURT: You are getting that now?

[Tr. 157] A. Yes, sir.

Q. Where is this water coming from?

A. It is rainfall. When this trench is open and we are disposing of things inside it, and it rains on it, the water trickles down through, hits the synthetic liner, hits the gravel, and flows through that pipe into the pump and we pump it out.

THE COURT: What do you do with it?

A. It is stored on site in a tank and then we ship it to Texas for disposal.

Q. Why do you ship it to Texas for disposal instead of disposing of it on site?

A. Because there is a deep well injection facility in Texas, that we don't have. The only thing we could do would be solidify it and put it back in the trench.

Q. Are there any deep well injection facilities in the state of Alabama?

A. I don't know whether there are any of those still operating privately or not. I know there is not a commercial one.

Q. There is not one that would take it?

A. There is not one in Alabama that would take our stuff.

Q. If I can describe it as a regular landfill, do the county landfills generate leachate?

A. I am certain they do.

[Tr. 158] Q. What about industrial landfills that accept industrial nonhazardous waste?

A. Any landfill that is operated in anyplace where it rains generates leachate.

THE COURT: Do you have a different category for that leachate? Do you have hazardous and nonhazardous?

A. The leachate that is collected because of rainfall in a hazardous waste facility is, by definition of EPA, a hazardous liquid. The leachate generated in a landfill may or may not be hazardous, depending on what they put in the garbage landfill.

Q. So the leachate from a garbage landfill could be hazardous?

A. It could have hazardous characteristics, depending on what went in that garbage landfill. It is not defined as hazardous as a TSD facility under RCRA.

A. It is a hazardous waste landfill, transportation storage facility.

* * *

TESTIMONY OF SUE ROBERTSON

[Tr. 194] Q. Good morning, Ms. Robertson. Would you state your full name for the Court, please?

A. Sue R. Robertson.

Q. Where do you live?

A. I live in Wallsboro, Alabama.

Q. By whom are you employed?

A. The State of Alabama, specifically the Alabama Department of Environmental Management.

Q. In what capacity?

A. I am Chief of the Land Division, which is responsible for regulation of hazardous and solid waste.

Q. Would you please give the Court a brief summary of your educational background?

A. I have a B.S. Degree in Chemical Engineering from the University of Alabama. I have a Master's in Chemical [Tr. 195] Engineering from Georgia Tech. I have been employed with ADEM or its predecessors for the past 18 years.

Q. And are you a registered professional engineer?

A. Yes, in the state of Alabama.

Q. In the state of Alabama. When did you receive that designation?

A. 1977.

* * *

[Tr. 205] A. EPA has, through their regulatory process, classified for about 455 chemicals, specific chemicals or listings as being hazardous. In addition, they have other characteristic procedure which says that if a waste [Tr. 206] is corrosive or if it is reactive, or if it is ignitable, or if it fails a test procedure, which was referred to as an EPA tox, but now there is another test procedure that replaced that called the toxic characteristic leaching procedure, which you will hear a lot of people refer to as TCLP. This covers an enormous range of chemicals, and Chemical Waste Management, through the Part B permit and their interim status, can landfill or can manage virtually all of those different chemicals. In addition, Chemical

Waste Management is permitted to manage PCBs or polychlorinated biphenyls. And, in addition to that, they are also permitted to take CERCLA waste, which is cleanup waste that Dr. Henson referred to yesterday, and these could encompass an even wider range of chemicals that are of concern under the Clean Water Act or the Air Act. So, there is a very broad range. These chemicals are again determined to be hazardous, because they might be reactive. That means if they are mixed with other chemicals there would be a reaction. Ignitable at other facilities in the early '70s in the past, drums would explode and the storage facility would catch on fire. And there's been some large contamination and resulting cleanups from that type incidents. Corrosive—if corrosive material would eventually eat through some [Tr. 207] storage containers, then that would allow them to perhaps react with other chemicals it was stored with, and then they are toxic. A large percentage of the chemicals are listed as being hazardous because they are toxic. They have been determined to be carcinogenic and mutagenic, and have impact on human health.

* * *

[Tr. 216] A. * * * But there is also concern about long term, and there are some very hazardous compounds that are landfilled there that are considered to be hazardous because of their effect on human health, that there were studies or [Tr. 217] actual verification that these compounds when it got into the ground water caused cancer, caused malformed babies, caused miscarriages, et cetera; so I would say there are two types of concerns, the sudden, which would be ignitable waste that Dr. Henson talked about, and then the long term, which would be the cancer causing agents that could get into the water table.

* * *

Q. Ms. Robertson, we were talking about the differences between a gasoline truck which would be going to the gasoline station and other trucks with flammable

liquids which may be destined for treatment at Emelle. Are the types of liquids contained in those trucks intended for treatment at Emelle, are they of the same type ignitable characteristics that the gasoline truck would be?

A. Part of them would be, yes.

* * *

[Tr. 219] Q. Now, tell me, if you will, what are some of the more hazardous wastes that are stored at Emelle, please, ma'am?

A. Stored or landfilled?

Q. Landfilled at Emelle. I'm sorry.

A. Well, again, PCBs are landfilled at Emelle in large amounts. They are considered hazardous. You have a large amount of plating waste that goes to Emelle. Those are contaminated with metals such as lead, cadmium, chrome, cyanide suppressant are present many times in plating base, and those can be released. If they are released in a gaseous state, they are considered fatal to humans in concentrations as low as, I believe, three or 400 parts per million. So, metals are considered to be pretty much prevalent. Once they are disposed they stay as metals in the environment, and some of them have high solubility in water, or cyanide, and would move into the water table if an opportunity presented itself.

Q. You mentioned a minute ago when I asked you a question about storage of these wastes at Emelle, and you asked me if I meant landfilled. With respect to materials that are landfilled at the Emelle facility, how long is it anticipated that those materials and wastes will [Tr. 220] be landfilled there?

A. Chemical Waste Management, in their closure plan, intends to cap that waste that is landfilled, and that it will be left there forevermore.

Q. And these wastes that are capped in the landfill in Alabama forever will require what type of, in general terms, continuous regulatory activity?

A. On any particular regulatory, on my part, or maintenance on their part?

Q. Both. I'm sorry.

A. Okay. I will continue to have to regulate that facility even in a closed state to insure that ChemWaste is doing what is required under the post closure provisions. When you get a permit, which is referred to as a post closure permit when a facility is closed with waste in place, that post closure permit would require that ChemWaste maintain the cap so that water or liquids do not permeate the cap, get in the landfill and cause possible ground water contamination, requires that monitoring be carried out on a periodic basis; and at the present, those requirements would be for 30 years after they close the facility or the landfill.

THE COURT: Continuing regulation for 30 years?

A. Yes, sir.

THE COURT: Why are you able to stop at the end [Tr. 221] of 30 years?

A. The federal law or EPA specified that that was all that is required, that 30 years; but in actuality, the waste will be there and there will still have to be monitoring of some sort that will go on at that facility forever, because the waste will be there forever, and the longer the waste is there the greater the probability that the liners may deteriorate and that there might be contamination.

* * *

[Tr. 241] Q. Now, are those, all of those that you just read, fire, explosion, spills, and materials release, and accidents, they have listed there under emergencies inherent to [Tr. 242] closure operations?

A. That's correct.

Q. Are those all risks that are attendant to handling, managing and landfilling hazardous waste at the Emelle facility?

A. Yes.

Q. In your judgment, is that risk increased by increased volumes of hazardous waste that is managed, stored and landfilled at that facility?

A. Yes.

Q. Look at paragraph 1.4.2 under natural events, please, and tell the Court what ChemWaste says are natural events which are potential facility emergencies.

A. There are potential facility emergencies which could result from acts of God, including major climatological, geophysical or other natural events, such as heavy rains and surface runoff, tornadoes, heavy winds and forest fires.

Q. Is there any mention of earthquakes in that?

A. No.

Q. And with respect to those natural events which are potential emergencies that could occur at or around the Emelle facility, is it your judgment that the risks attendant to those would be increased based on the increased volume that is stored and landfilled at that [Tr. 243] facility?

A. Yes.

Q. I will ask you, Ms. Robertson, has it recently come to your attention that an earthquake did actually occur in Sumter County in 1886?

MR. WELLS: We will stipulate that there was an earthquake 104 years ago in Sumter County. I don't think we need to ask every witness.

MR. PARKER: We will accept the stipulation.

* * *

Q. ChemWaste's contingency plan does not address the potential for earthquakes; does it?

A. No, it doesn't.

* * *

[Tr. 251] Q. You mentioned earlier the newly permitted BFI landfill at Last Chance, Colorado. I ask you are there any landfills which have been started and permitted since RCRA came into existence in November of 1980 for hazardous waste?

A. No. Last Chance is the only green field site, which [Tr. 252] means there was nothing there before they came in and put a landfill there.

Q. All of the other hazardous waste landfills operated and preexisted the effective date of RCRA?

A. They came in under interim status meaning they made that demonstration that they were accepting hazardous waste and they, therefore, got a Part A permit and didn't go through getting a Part B, as the green field site.

MR. PARKER: Your Honor, do you understand what the green field site means? You might explain that, if you would.

A. When you refer to a green field site it means that there was nothing but grass there before, and that there was nothing there, and you came in and put some type of industry there.

Q. Now, with respect to Last Chance, Colorado landfill, which is the only permitted landfill, which is a green field site, since RCRA, how much waste has been introduced into that landfill?

A. None. It became operational or could have been operational in the spring of this year. BFI made the corporate decision that it would no longer manage hazardous waste; and, therefore, put up for sale all of its hazardous waste facility, so this facility was [Tr. 253] never operated and is for sale.

Q. Has it been sold at the present time, to your knowledge?

A. No.

* * * *

[Tr. 298] Q. Have you reviewed the records of ADEM to determine what spills have occurred on site at Emelle?

A. Yes.

Q. And would you please tell the Court, or summarize, those spills, the dates and types of spills they were?

A. On October 4, 1984, a solution with a pH greater than 13 was placed in the RCRA surface impairment number 3, which contained a low pH sludge. The comingling of these wastes resulted in an orange colored

atmospheric emission being emitted. On August 18, 1985 there was a hazardous waste spill, which occurred on site, which contaminated an area of on site soil. Efforts to contain this spill weren't effective and there was off site contamination. ChemWaste indicated that equipment failure caused the release. On April 4, 1986, 50 gallons of waste acid were spilled on the ground during the loading of a tanker when the acid apparently caused the tanker walls to fail. On September 17, 1987, approximately 30 gallons of solvent waste was spilled when a tanker hose failed and contaminated on site soil. On March 22, 1989, a truck driver released a 10,000 pound load of ash with less than 500 ppm, PCBs on a paved parking lot. On August 31, 1989, 55 gallons of D001, F003, and F005 spilled from leaking drums on [Tr. 299] a paved parking lot.

Q. Are those listed hazardous wastes with EPA code numbers?

A. Yes.

Q. Go ahead.

A. On September 14, 1989 approximately 70 pounds of D008 waste spilled from a truck at the ChemWaste scales. On September 1st, 1989, one gallon of F006 hazardous waste leaked onto the pavement at the site when a truck was parked on an incline. On October 13, 1989, 20 gallons of F003 and F005 and D001 hazardous waste spilled on facility soil. On November 3, 1989, 25 gallons of D002 and K062 leaked from a truck at the facility. On November 8, 1989, 10 gallons of D007 and D008, spilled from a truck tailgated at the facility. On December 5, 1989, two gallons of D001 and F02 and F005 were spilled from an unsecured lid on a tanker truck. On December 13, 1989 approximately 20 gallons of listed waste spilled from a tanker at the solvent recovery area. On December 29, 1989, approximately 15 gallons of flammable liquid was spilled on the pavement from a tanker when the top vent was not secured. On January 16, 1990, two gallons of liquid from site D004 and D004 hazardous

waste spilled from the rear of a rolloff. In the spring of this year there were some brominated tablets put into the trench and came in contact with [Tr. 300] some moisture and caused a release, an orange colored cloud release also.

Q. Now, with respect to all of those spills that have occurred on site, that you have just identified, were all of those spills remediated by ChemWaste?

A. Yes, they have.

Q. Now, I notice that beginning from 1984 to 1989 there were—I'm sorry. '84 up through the beginning of '89 there were four spills that were reported. Since '89, there have been one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, by my count, that you have reported. Is that approximately correct?

A. Yes.

Q. And how does the incident of spills correlate, if it does, with the increase in the volumes that have been disposed of at Emelle?

A. Well, the volumes managed on site have increased since 1985.

* * *

[Tr. 301] Q. And accordingly then what—is there a difference between the volumes of out-of-state waste that are disposed of at Emelle and the volumes that are disposed of from in state?

A. The majority of waste managed at Emelle, according to the records provided by ChemWaste, according to Dr. Henson's testimony, is from out of state.

Q. And that is the 85 to 90 percent we have been talking [Tr. 302] about?

A. That is correct.

Q. Is there any reason to believe that those percentages will not continue to hold true with respect to volumes that are disposed of at Emelle in the absence of the Fee Act which has been enacted, which is in litigation today?

A. As I previously discussed, the number of landfills are decreasing every year. Some of these landfills have caps placed on them. The only one that has been cited within the last 10 years is the Denver, Colorado facility, which has a cap. The trend is that there are fewer and fewer landfills that can handle this waste. There are landfills that are going to be filled up within the next few years. The GAO reports indicate that EPA just doesn't have any idea or good data on the amount of CERCLA waste that will need to be cleaned up and properly disposed of, that they don't have a good feel on the amount of hazardous waste that will eventually be declared to be hazardous waste. And so, even though you have the land ban restrictions and that will minimize untreated waste going to the landfill, you still have these forces that are going to increase the amount of waste that can be hazardous and at the same time the amount of waste, the amount [Tr. 303] of permitted disposal sites is decreasing; so, the law of supply and demand would indicate that the waste would still, the amount of out-of-state waste, would still be at least the 85 to 90 percent number, if not greater.

* * *

[Tr. 305] Q. And shown on that chart would you explain what the volumes are since 1985 at the Emelle facility?

A. Well, as the bar chart indicates, in 1985 ChemWaste received 341,000 tons of waste. These are approximate numbers rounded off. In 1986 they received 456,000 tons. In 1987 they received 564,000 tons. In 1988 they received 549,000 tons of waste. In 1989 they [Tr. 306] received 791,000 tons of waste. And through August of this year they have received 480,000 tons of waste.

* * *

[Tr. 310] Q. What effect, if any, have the increased volumes of disposal at Emelle, not disposal but landfilling

of waste at Emelle had on ADEM's ability to monitor and otherwise perform its obligations at the Emelle facility?

A. When Emelle was accepting very large tonnages per month it increased the difficulty of our staff being able to monitor that operation. They were operating, in essence, around the clock. There were trucks backed up out of the gate onto the highway. It was impossible for ADEM to really be able to adequately monitor the site.

* * *

[Tr. 316] Q. Now, if you will, please tell the Court the size and type of leachate storage facilities they have at Emelle.

A. Emelle has a tank farm that is capable of storing five million gallons of leachate.

Q. Five million gallons?

A. Yes.

* * *

[Tr. 334] Q. For each one of those facilities the post closure period is 30 years; isn't it?

A. That's correct.

Q. Now, where is that 30 years set forth?

A. In EPA and State regulations.

Q. In the EPA and State regulations?

A. That's right. Our regulations are identical.

Q. Do your regulations have to be identical? They don't; do they?

A. No. The EPA, the RCRA law says that states can be more stringent.

Q. So, if you wanted to extend the post closure care period beyond 30 years, you could change the State regulations to do it; couldn't you?

A. I guess that is a discussion. We have considered that and are evaluating the 11th Circuit's opinion to [Tr. 335] determine if we can do that.

* * *

[Tr. 336] Q. And I assume if ADEM didn't like the way that corporate guarantee was written, since the permit he has got to certify that it is word for word identi-

cal with the regulations, you can change the regulations; is that right?

A. On the financial assurance part of the regulations, EPA is very cautious, and I would doubt that we could change it without stringent tests, because of the necessity to be equal; but, in theory, you could, yes.

Q. Okay. What you are saying is the financial assurance required not only in Alabama but everywhere in the United States has to be word for word identical?

A. That's correct.

Q. Under EPA regulations?

A. Yes.

* * *

[Tr. 350] Q. So it would be fair to say that the statements in here where they have any criticisms of post closure liabilities would apply pretty much equally to any kind of facility that closes in place?

A. In theory, yes; it is saying there is that same concern.

* * *

[Tr. 361] Q. So, I take it that if the United States of America, hypothetically, was a responsible party, that would relieve some of your concern about the state being ultimately stuck, if you will, if I can use the vernacular?

A. Again we're getting back on the area of where the federal government really is liable or would choose to be liable.

Q. I am asking you to assume, for sake of argument, they are absolutely, strictly, jointly and severally liable under 107A CERCLA.

A. You may make a theoretical assumption, then, yes.

* * *

[Tr. 364] Q. Now, earlier you were talking generally about risk, and risk of the what ifs that occur or could occur, might occur, earthquakes, tornadoes, or hurricanes. The risks other than volume was the thing that you talked about Emelle, as I recall?

A. That's correct.

Q. It didn't really have anything to do with whether the waste was from in state or out of state?

A. That's correct.

Q. It really had to do with volume?

A. Quantity, yes.

Q. So you would agree that the risks don't depend on where the waste comes from, given equivalent quantities?

* * *

[Tr. 365] Q. The risks don't depend on whether it is in state waste or out of state waste; your concern is the volume?

A. The chemical composition at the landfill would not be any different; but you would have the transportation risk we discussed also. And that is related to quantities; but you have the different routes coming in.

Q. Now, some of the routes coming in, speaking of transportation, some of the routes coming into Emelle only travel over Alabama highways just a few miles if they are coming from the west?

A. Yes.

Q. And Emelle is almost to Mississippi?

A. Almost in Mississippi, yes.

* * *

[Tr. 366] Q. Now, let me ask you one thing, if you know it. I think you had talked about what you tried to calculate as the number of trucks that went into the Emelle facility in 1989, and I think you came up with a 40,000 figure?

A. In general, yes.

* * *

[Tr. 369] Q. Okay. Now, speaking of transporters, you have said, in terms of hazardous waste transportation, that ADEM regulates hazardous waste transportation?

A. That's correct.

Q. And you give them permits if they meet certain requirements?

A. That's correct.

Q. And one of the requirements is they have to have adequate liability insurance to take care of things like this. This happened to be a chemical spill?

A. That's correct.

Q. That one you didn't regulate until it got spilled; is that right?

A. That's right.

Q. But the hazardous waste trucks you regulate while they [Tr. 370] are rolling?

A. That's correct.

Q. And you wouldn't give a permit to a hazardous waste transporter if it didn't have adequate liability coverage; would you?

A. We wouldn't give a permit unless it complied with the regulations which require that.

Q. The regulations require adequate liability coverage?

A. Correct.

* * *

[Tr. 410] Q. Now, Ms. Robertson, you ended up, I think, by saying, [Tr. 411] if I caught this correctly, there are risks inherent to managing hazardous waste; is that correct?

A. Yes.

Q. So there would be risk to managing hazardous waste not only at the Emelle facility, not only at the Allied Signal incinerator, but all of the other 32 additional hazardous waste treatment, storage and disposal facilities; right?

A. Yes.

* * *

TESTIMONY OF RICHARD GROSHONG

[Tr. 267] Q. Now, Dr. Groshong, do you presently teach at the University of Alabama as a full professor?

A. Right, I do.

Q. What is your area of concentration or teaching?

A. Structural geology, rock deformation.

Q. All right, sir. Is it correct that you and Dr. Rona J. Donahoe prepared a paper back in April of this year entitled Hazardous Waste Disposal in the Upper Crustatious Selma Group?

A. That is correct. That is actually a composite guidebook consisting of three individual papers.

[Tr. 268] Q. Incidentally, what is the position of Dr. Donahoe at the University of Alabama?

A. She is an associate professor of geology.

Q. Now, is it correct that in this study that you have done, you have made some comments on the fractures and faults and joints out at Emelle?

A. Slight comment on that, rather specific comment on work that we did nearby at Port Epps, in Epps, Alabama.

Q. Is that Sumter County?

A. Right.

Q. What is significant about Port Epps?

A. It's an excellent exposure of the Selma chalk, which we were able to visit and do our work at.

Q. And would you tell us briefly how you may describe fractures and joints and faults?

A. Okay.

Q. In whatever order you think appropriate.

A. A fracture is used by many geologists and engineers as kind of a general term. Properly it is a brittle crack and can be a fault with displacement parallel [Tr. 269] to the surface, can be a joint with displacement perpendicular to the surface.

So, with the paper, we tear it—

Q. Hold that up so the Court can see that. Would you turn please and face the Court.

A. Okay. This qualifies as a fracture. Now, if it does nothing more than this (Indicating), then it would be known in the geological terminology as being a joint; and a joint might move a little bit open, it might move a fair amount open; so that would be a joint. And there are joints in the Selma chalk. The other thing that the fracture might do is move parallel to its face, in which case it becomes classified as a fault in the geological terminology. Faults may, as you can see with this one, produce gaps and holes along the trend of the fault when they move.

Q. Now, what you described, those fractures, faults and joints, were they present in the Selma chalk?

A. They are.

Q. And is that what you have done your paper on?

A. Right.

[Tr. 274] Q. Now, I ask you to look at your paper beginning the next page, Roman Numeral 421, and tell us in layman's language, and if you could, just give us a quick summary of that.

A. Okay. Well, the subject was structures influencing the permeability of the Selma group in western Alabama. In the numerous exposures that we have worked on, including the one at Epps, we find that there are faults and joints fairly commonly in the Selma chalk. Both of those are known geologically to be commonly capable of transmitting water. So our question was, is there [Tr. 275] any evidence that the fractures that we see in this area are capable of transmitting water. And we found considerable evidence that the faults do, at least some of the faults do, transmit water. We found less evidence that the joints transmit water; but the faults transmit water because they do have holes along them from place to place, and also some of them are fairly

complex zones of multiple faults, which when they move do exactly what this piece of paper does, which is they don't fit properly like that (Indicating), and consequently develop holes along the fault zone. We collected some of the fillings, because these faults are characterized by having calcite fillings. We collected some of the fillings, and some of them are completely filled and appear to be nonconductive; others there are holes that you can stick your pencil into, in these fillings, where it is simply an incomplete filling. The fillings are calcite that was deposited from saturated fluids, presumably from deep underground. The fillings also show evidence that they have been subsequently chemically etched, which means they have been attacked by unsaturated fluids which is characteristic of shallow ground water. So, that is one of the evidences that these faults are transmitting ground water today. Other evidence is that they are [Tr. 276] significantly stained by iron, and only the faults were stained. We didn't find evidence of that on the joints. Of course, the fairly out in the field evidence is that the water was leaking out of the faults in the outcrop and the plants were growing on the faults in the outcrop as opposed to no water leaking out of intact chalk, and no plants growing on the intact chalk in this area. So that is the basic evidence that we had.

Q. How deep do these faults and fractures extend into the Selma chalk, in your opinion?

A. As far as we know, they could go completely through the chalk. We really don't know. No one knows, as far as I am aware.

Q. Do you mean all the way down to the Eutaw aquifer?

A. Perfectly possible.

Q. Now, is the area around the faults and fractures more or less permeable than the chalk itself?

A. Well, I would judge that the fault zone itself would be more permeable than the chalk itself. It could be more permeable by many orders of magnitude.

Q. What do you mean by many orders of magnitude?

A. By factor of a thousand, factor of 10,000. It entirely depends upon how big the hole is and whether it has been completely filled or partially filled.

[Tr. 277] Q. Now, did you reach a conclusion in your paper, reach an opinion back earlier this year as to whether, in your opinion, the fractures, faults, rather, at the Emelle facility had been properly mapped?

A. We find no evidence that they have been mapped. There are certainly no maps that I have been able to see. So, I would have to say that, to my knowledge, they have not been properly mapped.

Q. At my request on Thursday of last week, Thursday and Friday, did you review the Golder & Associates reports which were identified and have been identified in this case, some 12, I believe, and the two Woodward Clyde reports which have been furnished us by the plaintiff which we, in turn, furnished you?

A. Yes, sir.

Q. Now, after having reviewed those reports, do they, in any way, affect that opinion you had reached back in April?

A. Well, they confirm it in part. We inferred from aerial photo studies that probably there were faults in the pits at Emelle. Also we had photographs taken by other people that showed the faults in the pits. The reports confirmed that.

Q. Were those the pictures of trench 16, I think, that were in the book?

[Tr. 278] A. That are in our book, right. So the report did confirm the presence of the faults, and the Woodward Clyde report, one of them, discussed doing permeability tests on three of the faults, and their permeability tests showed, as far as they were concerned, no difference in permeability on the faults than in the rock around it, which doesn't really alter my opinion, because that would be true on the faults we saw ourselves, depending upon where you measured the fault,

because the faults change their properties along the plain of the fault. So, to actually document that the fault doesn't leak anywhere, you have to see the whole fault and then you have to decide whether there are no holes along the fault or whether, in fact, there is maybe, let's say, on a 50 foot exposure of a fault you might find two significant holes six inches in length. So, I have no idea whether the worst part of the fault was tested or not.

Q. Would there be anything in the Golder & Associates or these other two Woodward Clyde reports that would indicate that had been done?

A. No. As far as I could tell, it was not done.

Q. What is your opinion, after having read these reports, the 12 or so Golder & Associates reports and the two Woodward Clyde reports?

[Tr. 279] A. My opinion would be they really have no idea whether the faults are potentially going to leak.

Q. Do you have an opinion as to whether the water is moving laterally in the Selma chalk?

A. It certainly was in the exposures that we looked at, otherwise we wouldn't be able to see evidence of the water moving out of the fault zones. I guess I really don't have an informed opinion about the waste site itself.

Q. Now, did anyone pay for the paper that you prepared, the time and effort that went into it?

A. No; this was scientific research, just part of the job.

Q. Originally who was to publish—

A. Originally this was to be published as a part of a meeting related guidebook series to be published by the State Geological Survey.

Q. Did the State Geological Survey, in fact, publish this?

A. Not this one, no.

Q. Was there any reason stated as to why not?

A. Nothing in writing. Informally I was told that this was too controversial, they didn't want to publish it.

Q. Who, in fact, did publish it, this paper?

A. The Alabama Geological Society, which is an organization [Tr. 280] of geologists.

Q. Of geologists here in Alabama?

A. Right.

Q. Approximately how many members?

A. Maybe a hundred and fifty.

Q. Are most geologists in Alabama members of that society?

A. Probably the vast majority.

Q. Now, in your opinion, is it possible for the fractures and faults to extend all the way down to the Eutaw aquifer?

A. It is very possible. And we really don't know why those faults are there. Every place we have seen very good exposures of the Selma chalk we tend to see the faults. So, as far as I know, we have seen a fair amount of it in different places.

Q. In your opinion, is it possible that the faults or fractures that could extend vertically down into the Eutaw aquifer, would they have increased permeability of several orders of magnitude?

A. It is certainly possible.

Q. What about laterally at the surface?

A. It would be the same.

* * *

[Tr. 281] Q. Dr. Groshong, as I understand it, you did not do a study of the Emelle facility; is that correct?

A. Not within the facility. We did a photo study, an aerial photo, taken of the site.

Q. You did not do any studies on the ground or in the ground at the facility?

A. No.

* * *

[Tr. 282] Q. You have never done any hydrogeological characterization of the Emelle facility; have you?

A. No.

Q. All right, sir. You have also not done geochemical studies of the Emelle facility; have you?

* * *

[Tr. 283] Q. Have you ever—I assume as a geologist you have done permeability tests?

A. I haven't done the test, no.

Q. You actually have never done a permeability test of anything?

A. That's true.

Q. Okay. Well, I guess you didn't do any permeability tests of any of this Selma chalk then; did you?

A. Nothing.

* * *

TESTIMONY OF BILL BROCK

[Tr. 416] Q. Would you state your name, please?

A. My name is Bill Brock.

Q. What is your title?

A. I am the Director of the Alabama Emergency Management Agency.

Q. What is the function of the Alabama Emergency Management Agency?

A. My agency is one that controls, manages, monitors any emergency situation that might occur within the state of Alabama.

[Tr. 417] Q. Well, would your agency have a role to play, say, in the event of an accident on a highway?

A. Depending upon the severity and if it was an accident carrying some kind of hazardous material or chemical spills or volatile or explosive material.

Q. What about natural disasters?

A. Yes, sir, we are responsible for emergency recovery phase of any disaster.

Q. Mr. Brock, are you aware that Chemical Waste Management operates a facility at Emelle, Alabama?

A. Yes, sir.

Q. And that is located in Sumter County; is it not?

A. That's correct, yes, sir.

Q. Are you aware that ChemWaste has a contingency plan that has been introduced already as Defendant's Exhibit Number 55?

A. Yes, sir, I am.

Q. And the contingency plan identifies possible emergencies that might occur on site; is that correct?

A. That is correct, yes, sir.

Q. And just briefly, isn't it also correct that the contingency plan identifies both emergencies that are inherent to facilities operations, that is fires and accidents and spills, as well as natural disasters that might occur, such as tornadoes?

[Tr. 418] A. As I have read it, yes, sir.

Q. Now, would the Emergency Management Agency play a role in the event of an emergency of any kind at Emelle?

A. At Emelle or any other site if the emergency expands or continues to grow to the point it surpasses the ability of that community, that subdivision, to handle it themselves, at that point then we are there to dispatch any other state or federal resources that are necessary in the recovery or cleanup or any other problems that may be occurring.

Q. In fact, the contingency plan identifies your agency as the contact source; does it not?

A. That is correct, yes, sir.

Q. Are you familiar with the recent history of tornadoes and severe thunderstorms in the Sumter County area?

A. Yes, sir.

Q. And say for the last 12 months or so, can you tell the Court whether there have been any tornadoes in Sumter County?

A. According to our log book and the duty officers, we maintain a duty officer 24 hours a day, and direct contact by telephone and radio with the public safety people statewide in the region of the southeastern United States, and also direct lines with the National Weather Service, and any time a storm front approaches [Tr. 419] we are notified and we have our own radar system that we monitor these storms with as they develop and come in out of Mississippi. In the last 12 months in Sumter County we have recorded 10 severe thunderstorm watches in Sumter County.

Q. What is a thunderstorm watch?

A. A watch is a description issued or a category issued by the National Weather Service that said the cloud system or cold front moving in has the potential of developing severe thunderstorms, that you need to be on the watch, be prepared to make necessary emergency preparations.

Q. How does that contrast with a warning?

A. Well, in the stages as it progresses the watch occurs and then when the storm starts developing and the clouds start building in size and severity, at that point, or some point in between, they say a severe thunderstorm has formed. You see the intensity levels change on the radar screen and that determines at the point a new warning is issued, because you have seen a thunderstorm cell build. Usually when the thunderstorm warning exists, at that point the National Weather point will issue a tornado watch. When the severity of the storm builds to the point of level five or level six, the potential of a tornado is forming or microbursts [Tr. 420] that are now being identified as we have had in the last few weeks in Alabama. They can form out of a severe thunderstorm at any time without warning; so usually we will issue a tornado watch at that point. Then when the tornado watch is there, that immediately notifies us as well as the meteorologist to be on the watch to watch those thunderstorm cells as they travel across the state and to look for any further development. If we see that, then a tornado warning is then issued. A tornado warning can also be issued when there is a definite hook symbol on the radar screen or there has been a visual sighting of a tornado.

Q. Now, you have your log book there; do you not?

A. Yes, sir.

Q. How many severe thunderstorm warnings have been made for Sumter County in the last 12 months?

A. In the records that we maintain we had 10 thunderstorm watches, four of those turned into thunderstorm warnings. Of the four thunderstorm warnings we had eight tornado watches for Sumter County, with two tornado warnings, which means there were at least two tornadoes sighted. One was within a half a mile of the Emelle facility in Sumter County.

Q. When did that occur?

A. The sighting of the tornado that was within half a [Tr. 421] mile of the site, to my recollection, without going back through the records, would be in the second week of February.

Q. Of this year?

A. Of this year.

* * *

[Tr. 428]

Q. Would you indicate to the Court from this exhibit, Number 60,— Would you tell the Court what accidents [Tr. 429] have occurred involving vehicles destined for Emelle since 1981?

A. Would you like for me to start at the top?

Q. Yes.

A. On 2/10/81 a truck carrying acid had run off I-20 spilling the material. EPA was not notified until 2/20, some 10 days later. On 3/27/81,—

MR. DeBRAY: Judge, the exhibit has been offered, and I assume it will be admitted into evidence. Is the witness going to read this entire exhibit into the record?

THE COURT: Has the exhibit been—

MR. SIMON: We can move on, Your Honor. We offer it in evidence.

THE COURT: All right, I will admit the exhibit over their objection.

Q. Mr. Brock, do you have an opinion, based on your experience, as to whether an increased number of trucks going to Emelle would increase the likelihood of accidents?

MR. DeBRAY: Objection. He hasn't laid the proper foundation that this witness can give an opinion of that nature.

THE COURT: Ask him if he can.

Q. Can you give an opinion on that, Mr. Brock?

[Tr. 430] A. Yes, sir, I feel I can.

Q. What is your opinion?

A. Any time you have an increase of traffic, whether it be trucks, cars, or what, in a concentrated area such as a rural area of Alabama where the roads were not designed for large volume truck traffic, you are bound to have some type of traffic buildup or backup of vehicles in those areas, because the roads are not designed to handle this volume of vehicles. If this is occurring at the time we have a tornado warning, or a tornado watch, we have got exact history recorded of what happened in Huntsville, Alabama on November 15 of last. It was at rush hour, the intersection started backing up with traffic when the tornado came through. The majority of the deaths that were recorded in Huntsville, Alabama from that tornado was because of that backup or volume of traffic on those highways. Had there not been that much volume, had there not been that many vehicles on that road, there would not have been as many deaths. So, at the same time those large volumes, and I understand some days it is in excess of a hundred trucks a day that are going into that particular facility, it has to create a volume or an impact on the roadways of that area.

* * *

[Tr. 434] Q. Let me ask you this, based on your position as Director of the Emergency Management Agency, has the agency received any report of earthquakes?

A. Only in the last four to six months. I would say it would be in the last six months I have been following and monitoring the earthquake situation in the state of Alabama. In the last four months I have instructed my staff to start a map, start an indexing of all reported incidences of earth tremors or earthquakes within the boundaries of the state of Alabama. This was in preparation for a scientific prediction of what is proposed to happen on December 2nd or 3rd of this year. The scientific community is currently studying. It has been a lot of news reports about this particular event that is sup-

posed to happen in the New Madrid Fault area of New Madrid, Missouri. Alabama is in the risk zone. We have a risk potential all the way to an area just north of Montgomery. In that particular area it depends on the severity and scale of the earthquake that is supposed to happen at that time, I felt that it would be a prudent thing to do to start monitoring the activity, because I just felt we would [Tr. 435] have some news inquiries, media inquiries, about activity in the state of Alabama. So, not only in our duty log do we record these things but the reports we get from the central United States Earthquake Consortium, those reports are also recorded and one of those particular reports, Lamar County, I believe in May of this year, recorded an earthquake of a three scale on the Richter scale in Lamar County. We have other recorded incidents in northwest and west Alabama of various tremor activity.

Q. Is Emelle in the risk zone?

A. Yes, sir, it falls within the risk zone.

* * *

[Tr. 437] Q. Now, Mr. Brock, the earthquake zone that you talked about, the risk zone that you said was throughout north and northwest Alabama, I believe; is that correct?

A. That's correct. That is from the New Madrid fault.

Q. So, facilities throughout that entire area would be [Tr. 438] at risk; would they not?

A. Yes, sir.

Q. Manufacturing facilities?

A. Yes, sir.

Q. Storage facilities?

A. Yes, sir.

Q. The chemical companies up there that store hazardous materials, they would be at risk; is that correct?

A. Yes, sir.

Q. You were asked a question about the contingency plan of Emelle. Have you ever read that?

A. Yes, sir.

Q. Do you know whether or not that is in accordance with ADEM regulations?

A. I am not familiar with ADEM. It is in accordance with SARA Title 3 program that we have to model the federal government. We have approved that particular plan with our people.

Q. So you had input in approving that plan; is that correct?

A. Yes, sir.

Q. You didn't call for that plan to make any kind of contingency, for example, for earthquakes; did you?

A. My people had the input in improving the plan. I, in turn, direct and manage my people; but the particular area of earthquake preparedness, no, I am not aware [Tr. 439] that anything was asked to be put into that.

Q. Now, the tornadoes that you talked about?

A. Yes, sir.

Q. Those tornadoes are not indigenous to Sumter County, are they? I mean, tornadoes can happen anywhere?

A. That's correct.

Q. And you heard testimony here today that there are 34 hazardous waste treatment facilities in the state of Alabama; have you not?

A. I don't know.

Q. You were in the Courtroom; were you not?

A. Not at that particular point of the testimony.

Q. Believe me when I tell you that is what she testified. And if that is what she testified to, tornadoes—those facilities would be subject to tornadoes just like the Emelle facility; isn't that correct?

A. That would be correct.

Q. When a tornado hits, it takes everything above ground; doesn't it?

A. Above; and if it happens to go over an open pool of water, there are records where it actually drained that pool of water and sucked it up like a vacuum cleaner.

Q. So, if there is waste buried underneath the ground, it's not necessarily subject to any kind of tornado?

[Tr. 440] A. I think that would be an accurate assumption.

* * *

[Tr. 453] Q. So, if waste was enroute to the Emelle facility from the state of Michigan and had an accident, there was a spill or incident, that required response by your branch of government, then it wouldn't be treated any differently than if there were wastes that were originated from up in the Mobile area coming to the Emelle facility?

A. That is a correct assumption.

Q. Are the risks associated with the waste different dependent upon the point of origin? In other words, is there anymore risk associated with waste that originates in the state of Michigan as waste that originates in the city of Mobile?

A. The only risk that we would have a reason to question the level of risk would be the volume of it. If it was a pickup truck load from Mobile and three tanker loads from Michigan, then naturally the risk is going to be greater from the three tanker loads than it would be from the pickup truck load from Mobile.

Q. If there is a tanker load from the state of Texas and a tanker load from the city of Mobile, carrying the same substance to the Emelle facility?

A. Under that particular scenario the risk we assume, that we would determine, would be equal.

* * *

TESTIMONY OF TOM JOINER

[Tr. 484] A. The one big question that has been kicked around with respect to this Selma chalk is does it have any water in it. You have heard that it doesn't have any water until it gets to 140 feet, which is the potentiometric surface of the Eutaw. This study, and the other work that had been done with shallow monitoring wells, tells you there is water in the Selma chalk, and there is water in the Selma chalk right up to very close to the land surface. And it tells you that the water in the Selma chalk does move. It will move from the high areas to the low areas. Another thing that was significant on this particular study was the fact that the day before they took their piezometer reading, the level of water in those wells they had drilled, they went and checked the level of the fluid in the trenches and these trenches have been placed on here, and so this depicts the situation where these trenches have filled with water.

[Tr. 485] Q. Which trenches?

A. All trenches shown on here, as depicted, have filled with water to the level of the water table. They have reached equilibrium with the water table. These arrows that you see here. These arrows that you see here are their interpretation of the way that water flows. You will note it indicates definite lateral and downward movement of the water. It is noting lateral and downward movement of water out of these trenches. And getting to the definition of leachate, that would be water that had come in contact with the material in the trenches. Then you would have to assume, on the basis of this diagram, that leachate has moved out of the trenches into the Selma chalk.

* * *

[Tr. 492] Q. Now, I believe you also said that in your opinion the water, since it was at equilibrium with the water table, that the leachate or fluid from the trenches would be into the Selma chalk; is that correct?

A. The flow that comes through the trenches is shown moving out into the Selma chalk, that's correct.

Q. And you say it is shown moving out into the Selma chalk. Would you tell us what you are referring to?

A. Here is the arrow showing the flow direction. These are flow vectors, as they call them, nonscaling. That doesn't mean anything quantitative; but it is just the direction you would have flow movement.

Q. Now, if left as is, if left undisturbed, what would be the direction of the movement of the leachate from those trenches?

A. Well, if you were to just leave this alone and let it flow, follow the flow vectors here, you can see that the water is going to keep moving seeking its lowest level. And by these flow vectors you can get in here and see that at some point you will have some upward flow into the stream. Now, you have also got a factor here that after you get down to about 138 [Tr. 493] or 140 feet you start getting some artesian pressure from the Eutaw.

Q. That is not depicted here; but you say that is the—what would you call that point at 140 feet approximately?

A. I would call that potentiometric surface of the Eutaw formula.

Q. So you are dealing here with two different things; surface water on one hand and ground water in the Eutaw on the other hand, and in the subcategory of ground water, or a different category being ground water in the upper portions of the—below the water table but within 10 to 12 feet of the surface up in the Demopolis chalk?

A. You have this water in the water table conditions, yes; and you have the flow regimen that they have established for this. Then also there is the Eutaw potentiometric surface that has to be considered in the overall scheme of things. But, with the flow coming down it will continue coming downgrade, downhill, if you will, until it discharges at the land surface into a drainage area or stream.

Q. Into what?

A. Into drainage area or stream.

Q. You mentioned drainage area. Looking at the first [Tr. 494] overlay on Exhibit 64, would you point out in the vicinity of these trenches is there a particular drainage area nearby?

A. You do have a drainage course coming in just north of trench 7, that extends off slightly northwestward, and you have another one here running going north—northwest, just north of trench 7.

Q. Is there a downward gradient coming from those closed trenches depicted on Exhibit 67 down into this drainage area?

A. I do not have this drainage area related elevation-wise to this section, so I can't speak for that directly on that. The thing I can tell you is that the movement of water is downward in that direction, and, you know, it is indicated on these sections. And it is also shown on this potentiometric map. It shows the level of that surface water is progressing lower and lower as it comes down.

THE COURT: Is this the kind of thing that they look at when they determine whether they are going to make this interim permit permanent or not? Does anybody know that? Go ahead.

Q. All right, sir, this, of course, is stated to be—this was August 1990, and I believe you testified to that; but is it, then—what is the first wet water [Tr. 495] all year round creek that runs in the area, or stream that runs in this general area?

A. I guess Bodiker Creek would be the nearest one that I know of.

Q. This is Bodiker Creek running in a roughly northwardly direction?

A. Generally northeasterly trend up there; and it goes up there a ways and then runs into the Natsuga River, I believe, and turns into the Tombigbee River.

Q. Do you know approximately how far the Tombigbee River would be from this point?

A. No, sir, I haven't measured that.

Q. Then is the Tombigbee River the boundary of Sumter County to the east?

A. It may be. I'm not sure. Do you want me to check?

Q. Yes, sir. Let's look at this map. Turn it over. Looking now at the Alabama Geological Survey.

A. The Tombigbee River would be the easternmost boundary of Sumter County, apparently all the way from the northern part of the county to the southern boundary.

Q. Okay. Let me ask you, is there anything further you want to say about that?

A. I was going to say as the crow flies it looks like it would be about 10 miles over to the Tombigbee River from the Emelle site.

[Tr. 496] Q. That is a straight line?

A. Yes, sir.

Q. Then, can you give any estimate, in your opinion, or do you have an opinion as to a travel time from the trenches to the drainage area? Do you have any opinion as to how far the leachate has moved out into the Selma chalk or Demopolis chalk?

A. No, sir.

Q. What are variables that would impact on travel time in this surface area of this leachate that has moved out into the Selma chalk from the closed trenches as depicted on the Golder reports?

A. You are referring to travel time or migration?

Q. Migration. Excuse me.

A. I think the variables would be the material through which the water had to move, and the condition of the material. If it is just solid unfractured chalk it would have one rate of movement; if it was just solid jointed chalk it would probably be very close to that same rate. And if one of the brittle faults, as described by Dr. Groshong, existed you could have along that another rate.

Q. Would that be a faster rate?

A. It would be a faster rate if the fault existed as described in some of these.

* * *

[Tr. 510] Q. Let's talk about risks to Alabama from the operation of the Emelle facility and the dangers, whatever, from a hydrogeologic engineering point of view.

A. Well, I summarized for you, and I think I gave to Mr. Wells in deposition, the major concern that we, we being my staff and I saw, was the fact that this facility is in Alabama, it is going to be here forever, and the long term liability of the facility was a major concern. The facility will have to be monitored. It will have to have regulatory surveillance. It will have to be maintained. It will have to be secured. And if there are any upsets of any kind that require abandonment or remediation, that will have to be done.

Q. Now, let's talk about monitoring. What do you mean with respect to monitoring?

A. Well, the monitoring that I am talking about right there would be the maintenance of good monitoring wells suitably placed, and hoping that you don't have any surprises with an unknown brittle fault as described by Dr. Groshong, bypassing that. That is an uncertainty that rests out there. But, at any rate, as they have done to this point, and I am sure they will in the future, you will have to make your best stab at installing and keeping a good monitoring well system [Tr. 511] there, which can be checked and provide a measure of quality assurance in the future.

Q. With that good monitoring well installation, would that include efforts to try to intersect every brittle fault from the various trenches?

A. I think, you know, as trenches are excavated they can see what they have in the trench area, and decisions for placement of monitoring wells can and are being made on a basis of that, is my understanding. That is something that is just going to have to continue. Now, after operations are ceased, there will be no new ones; so you have to hope in the process of getting all of this done that you are able to get any of these fractures or faults that could be problems pinpointed.

Q. Do you know whether all of the fractures at this time have been mapped?

A. I would be very surprised if all of the fractures and faults have been mapped. I think they've probably documented all that they have encountered in the trenches that have been excavated.

Q. In your opinion, would it be wise, in attempting to make sure that the monitoring wells are placed everywhere, to attempt to map all of the faults, brittle faults, or whatever?

A. I doubt if they can map all of them. There is a limit [Tr. 512] to what you can do on the land surface to look underneath. That will remain an uncertainty.

Q. No matter how many monitoring wells are put in, from a practical point of view?

A. From a practical point of view, yes, sir.

* * *

[Tr. 513] A. The findings of the Golder report are significant, because they demonstrate that you can have outward migration of this leachate toward the surface water in the state. And from the standpoint that it is a potential threat to the state of Alabama, I am concerned. I would think that from the standpoint of—well, I will just speak for myself. That is all you asked me for?

Q. Yes, sir. You mentioned secure. What do you mean by that?

A. I mentioned secure the facility from the standpoint of not letting people in there to have vehicle races, to disturb the surface, the security of the facility, both from the standpoint of the facility keeping it, [Tr. 514] keeping the integrity of the facility good and intact. And also from a safety standpoint of somebody getting in there and not knowing what they are dealing with and maybe create a problem for themselves and others. As far as the maintenance, not to leave that completely, maintenance of the grounds, you know. I think we have a lot of that grassed over and maintained and other

structures on it; but maintenance of the grounds against future erosion. You know, it is one thing to think 30 years and something else to think a hundred years; but when you think about it's going to be there as long as this state is here, then that puts another perspective on it. So, that could be a significant factor.

Q. You mentioned—was there some other? You had abatement and remediation; but was there anything else before that with respect to maintenance, security, and monitoring?

A. Regulatory surveillance. And somebody, Sue Robertson's people, or somebody in ADEM, is going to have the regulatory responsibility for this facility as long as it is there. They are going to have to insure that things that need to be done get done. So, that is an ongoing factor.

* * *

[Tr. 515] Q. From a geological scientific point of view or hydrogeological point of view, what, if anything,—would there be anything involved with possible abatement?

A. If a brittle fault, such as described by Dr. Groshong, existed and was capable of transmitting liquids undetected, the liquids could move through that fault and be missed by your monitoring wells. Then that could, you know, without having any specific information on how fast the liquid can flow through those brittle faults, it could be a few years or it could be many years; but still quite a bit faster than liquid would move through the chalk itself. Conceivably you could have outward migration through one of those type features that would create a problem that would have to be remedied, have to either abate it or go ahead and remedy [Tr. 516] it completely.

Q. From a geological scientific point of view what, if anything, would there be from a remediation factor?

A. Well, that was the kind of thing that I was talking about with abatement. If you can stop it and it is something you can tie in with your regular monitoring and

regulatory surveillance, that is okay. If it has created enough of a problem that you have to go in and remove some of it and remedy that particular problem, then that is the remediation I was talking about.

* * *

[Tr. 518] Q. Would it be significant, in your opinion, as to whether or not there had been a previous earthquake in the Sumter County area?

A. I think it would be significant in that having once happened there you feel reasonably sure it could happen there again.

* * *

[Tr. 519] Q. Is the existence of a major water system, such as the Tombigbee, a factor to be considered in measuring the risk from natural disasters, such as an earthquake, or from contamination of ground water, excuse me, surface water?

A. It is very difficult to project or hypothesize natural disasters, particularly as you would deal with something as unknown as, you know, the magnitude, whether it is going to hit or not, whether the magnitude is there or not, to try to relate it to something in Bodiker Creek or Tombigbee River, I think, you know, if you wanted to come from a consequence of an earthquake to this region of Sumter County, the one thing, and probably it would not take a major earthquake to do this, just one where you could feel the trembling of the ground, it could have an impact on cracking the material that seals some of the faults and open those again for the [Tr. 520] movement of water through them. You know, I suppose you could create all kinds of nightmarish situations for yourself with respect to what a major one would be; but certainly I am not in a position to do that. But if they did—if you did have the effect that I was talking about, then that could open avenues for the movement of water that do not exist today. And that could have a fairly strong bearing on future liability.

Q. In your opinion, is there any likelihood of increased knowledge, scientific, geologic point of view, that as we learn more about hazardous waste and its geological and hydrological effect from speaking on hazardous waste as landfilled in a facility such as Emelle, do you anticipate future increases in liability or risk or danger to the state?

A. Well, I think there's no question but what there will be additional knowledge gained about handling it, storing it, the hazards associated with it, and this kind of thing. And as that knowledge is developed and as technology evolves to respond to it, it probably will result in some changes in the regulations. And as changes in regulations occur, it could mean more monitoring in some instances for parameters not presently being monitored. It could increase the amount and [Tr. 521] level of effort that would have to be done in the future as this technology evolves.

Q. And the future long range cost of whoever it is during that time doing the monitoring?

A. Whoever is doing the monitoring and the maintenance, keeping the security.

Q. Of course, involved in the monitoring and removal of leachate would be the handling of that leachate after it was removed; would that not be correct?

A. That is correct.

* * *

[Tr. 527] A. My opinion is that as far as the state of Alabama is concerned, the more waste that we have in the state the higher our future liability is with respect to the facility.

Q. You are speaking of the hazardous waste landfill facility at Emelle?

A. Yes, sir.

Q. Would that be speaking of more additional waste brought into the hazardous waste landfill facility at Emelle?

A. The more waste we have and the more area that is prepared to receive the waste, the larger the facility be-

comes, the more monitoring wells you need, the more maintenance will be required, you increase the area that you have to keep secure, and you have increased amount of material that is down there to possibly create a problem.

* * *

[Tr. 546] Q. You agree, don't you, Mr. Joiner, that because of the Selma chalk the Emelle facility is the best location for a hazardous waste management facility like this in the state of Alabama; don't you?

A. I'm not sure how many turns you have in that question. I will not say the Emelle facility is the best site in the state of Alabama, because I think we have other areas within the chalk belt that could accommodate a similar facility just as well.

Q. Well, that—

MR. NETTLES: Had you completed your answer?

MR. WELLS: I'm sorry. I didn't mean to interrupt.

Q. But essentially the Selma chalk area?

[Tr. 547] A. The Selma chalk area for this type facility, in my opinion, is the best that we have in the state of Alabama.

* * *

[Tr. 555] Q. Your opinion is based on the fact that water will move in the Selma chalk?

A. That's correct.

Q. Albeit it at a very, very, very slow rate?

MR. NETTLES: How many verys?

MR. WELLS: I think I had three; but I might not have given enough.

Q. Is that correct?

A. It moves at a very slow rate, yes, sir.

Q. I believe you said that is one of the reasons this is a good site for a facility such as this?

A. Yes, sir.

Q. Now, in terms of anything moving through the chalk, it is not going to depend on whatever it is that is

moving through the chalk, whether it came from in Alabama or out of state; is it?

A. You will need to give me that one in another form, maybe, or something.

Q. It is not going to make any difference in terms of movement of liquid through the chalk whether the [Tr. 556] material in the trench is from in state or out of state; is it?

* * *

PLAINTIFF'S EXHIBIT 61

BERNARD L. WEBB

I. *General*

Born, November 27, 1924; married; two children;
4841 Mill Brook Drive, Dunwoody, Georgia 30338.

II. *Degrees and Designations*

M.S. Business Administration—University of Richmond, 1964

B.S. Business Administration—University of Richmond, 1949

Fellow, Casualty Actuarial Society—1964

C.P.C.U.—1956

III. *Teaching Experience*

Georgia State University, 1967-1989

Member, National CPCU Examination Panel,
1978—Present

C.P.C.U. Preparation Classes for Norfolk, Virginia
Association of Insurance Agents and State Farm
Insurance Companies, 1956-1962; Georgia Chapter,
Society of CPCU, 1968-Present

Member, American Academy of Actuaries, 1966

University of Richmond, 1957-1962

Member, National CPCU Grading Panel, 1961-1979
Wisconsin State University, 1963-64

Director, Basic Insurance School, National Association
of Professional Insurance Agents, 1980,
1981 and 1982

Insurance Institute for Asia and the Pacific, 1982

IV. *Honors and Awards*

Robert E. Early Visiting Scholar at the American
Institute for Property and Liability Underwriters,
1977 and 1980

Alumni Distinguished Professor, College of Business
Administration, Georgia State University,
1978

Ben F. Hadley Award, Griffith Foundation for Insurance
Education, 1976

V. *Professional Organizations*

American Academy of Actuaries

American Risk and Insurance Association

Casualty Actuarial Society

International Actuarial Association

Society for Insurance Research

Society of Chartered Property and Casualty Underwriters
(Past President of the Georgia, Virginia and Northern Wisconsin Chapters; Past Editor
of *CPCU Annals* (now *CPCU Journal*))

Southern Risk and Insurance Association

VI. *Insurance Experience*

Consultant to the Multistate Antitrust Task Force,
1988 to present.

Consultant to the Florida Academic Task Force for
the Review of the Insurance and Tort Liability
Systems, 1987-88.

Director, Physicians Insurance Company of Michigan,
1985 to present.

Consultant to the United Nations Commission on
Trade and Development, 1984

Consultant to the U.S. Department of Justice,
1977-1980

Consultant to the Subcommittee on Antitrust and
Monopoly of the Committee on the Judiciary of
the United States Senate, 1968, 1969

Actuarial Specialist, Hardware Mutual Casualty
Company, 1964-1967

Marketing Specialist (Research), Hardware Mu-
tual Casualty Company, 1962-1964

Executive Secretary, Insurance Advisory Commit-
tee of the City of Richmond, Virginia, 1955-1962

Sales Correspondent, Hardware Mutual Casualty
Company, 1953-1955

PLAINTIFF'S EXHIBIT 62

[State Seal]

STATE OF ALABAMA
Governor's Office
Montgomery 36130

For Immediate Release

August 27, 1987

Contact: Terry Abbott
Stacey Rimer
261-7150

MONTGOMERY: Gov. Guy Hunt Thursday said he will develop legislation to curtail the dumping of hazardous and solid wastes in Alabama while the Alabama Department of Environmental Management pursues new regulations to address such health problems.

"I wish to make it absolutely clear that we will take any and all action available to us to keep out-of-state waste out of Alabama. We will handle our own problem but we don't want anybody else's problems," Gov. Hunt said.

Gov. Hunt said he will push safeguards to ensure that solid waste generated out-of-state destined for an Alabama disposal location is comparable to that generated in-state and does not contain hazardous or infectious waste which are excluded from disposal in state sites.

He also called for "increased involvement of county and municipal governing bodies in assuming more local responsibility for approving the siting of sanitary landfills" as specified in the Alabama solid waste disposal act in section 22-27-5 of the Alabama code.

Gov. Hunt also said he wants existing facilities which intend to begin accepting much larger volumes of solid waste to secure a permit modification that would be as closely scrutinized as are applications for new facilities.

"I feel there must be more stringent siting requirements for commercial hazardous waste landfills and incineration facilities. Secondly, we must consider a cap or limit on the amount of waste received by commercial facilities," Gov. Hunt said.

"Although I have publicly proclaimed that 'Alabama is Open for Business,' I would like to clarify that statement by saying that this welcome is not extended to those in the business of burying solid, hazardous, or infectious wastes in our soil . . . or to those that would pose a threat to the quality of life for the citizens of this state," Gov. Hunt said.

"A major crisis facing this state, and this nation, is that of waste management. Whereas the volume of both hazardous and solid waste increases daily, the disposal alternatives are diminishing," Gov. Hunt said.

Gov. Hunt cited the recently internationally publicized incident involving the barge-load of garbage which left the Long Island community of Islip on March 22.

"After a five month 'odyssey' during which the waste was rejected by five states and three foreign countries, a solution was finally found, to return it to New York State, burn it, and bury the residue. In other words, the problem was returned to its point of origin for a solution," Gov. Hunt said.

The governor questioned if such situations would be more common in the future.

"My conclusion is that they will and that Alabama has the potential to become a prime candidate for disposal based on available land area, favorable geographical conditions, and, in some instances, waste disposal fees which provide an economic incentive to 'bring it to Alabama,'" Gov. Hunt said.

Gov. Hunt reviewed several recent events regarding solid waste disposal which reinforce his hypothesis.

Gov. Hunt said within the last month, state and environmental officials have had six inquiries from both existing sites, as well as proposed new facilities regarding the acceptance of large quantities of solid waste generated by out-of-state communities.

"This situation is alarming in the light of 41% of the state's sanitary landfills being unable to accommodate of Alabama communities within the next five years because they will be filled to capacity," Gov. Hunt said.

"One of those inquiring stated that as whereas disposal fees in the New York state area approximated \$100 per ton, by using the Tennessee-Tombigbee Waterway as a conduit, waste could be barged into Alabama and disposed of for less than \$20 per ton. It is not very difficult I believe for anyone to understand the economics involved," Gov. Hunt said.

The governor highlighted the hazardous waste management and Alabama's role in assuming a major share of the nation's responsibility for disposal.

"The chemical waste management site at Emelle currently manages approximately 400,000 tons of hazardous waste per year, about 85% of which is generated outside the state," Gov. Hunt said. "I am convinced that other companies are showing an interest in siting similar commercial hazardous waste facilities in the state primarily due to favorable geographical conditions. I predict that these factors which make Alabama so attractive as a hazardous waste disposal site will draw the solid waste disposal industry to us like a magnet."

Gov. Hunt noted a major hurdle in siting hazardous waste facilities in this state was recently ruled unconstitutional in federal court. He said the ruling involved the requirement of the Minus Act that such a facility receive approval of the Alabama Legislature.

"A significant aspect of this ruling, however, was that it clearly defined such authority as being within the pur-

view of legislative functions. I will quote directly from the conclusions of the federal court order: 'The court emphasizes that the constitution does not foreclose legislative restrictions on hazardous waste facilities. Such restrictions appear to this court to be essential for the protection of the health and safety of Alabama citizens. Storage of toxic waste is properly the subject of intense public concern. This court only holds that the Legislature must announce some reasonable standard which will guide its deliberations or the deliberations of an appropriate agency such as the Alabama Department of Environmental Management in determining which applicants are approved, and these standards must bear at least some rational relationship to a legitimate state purpose,' Gov. Hunt said.

The governor said the creation of such standards will be a major priority of his administration to ensure the health and safety of Alabamians: standards that will allow Alabama to place a priority on solving this state's waste disposal problems before assuming the responsibility for other states.

In addition, the governor said there should be full disclosure and publication of relevant details on permit modifications to existing sites and permits for new facilities to include names of corporate officials, projected volume, and locations where the solid waste is generated and maximizing effective public input through public comment periods on all permit modifications for existing facilities and applications for new sites.

And he noted an increased in disposal fees for commercial hazardous waste management facilities with a distinction in charges for the disposal of waste generated out-of-state versus that originating in-state should be approved by the Legislature.

"Critical components in both of these issues will be efforts to promote waste minimization, reduction, and

recycling and increased public information and educational programs," Gov. Hunt said.

"We think that our proposals are much the better.

Hazardous waste: "We need to do two things. We need to stop the increase in hazardous waste and lower it, as we tried to do with our cap bill that did not come out of House Judiciary (committee).

"If people are serious about tax reform next year, then (the impact of the higher fees on the budget is) something that can be looked at there. In the meantime, we've got to do something to stop the flow of hazardous waste into this state, to force other states to get their incinerators and do their job that they ought to do and that we've got a right to expect them to do. I'd be tickled to death to get both that increase and the cap bill" signed into law, the governor said.

"What his (Harper's) proposal is is that we allow 400 pounds for every man, woman and child in the state to come in."

Mail order sales: "If someone orders a hundred dollars worth of trees . . . if California is going to charge sales tax, then Alabama can charge sales tax. We think that that's much better than messing with the income tax at this particular point in time. These (companies outside Alabama) are competing with in-state firms that pay sales tax and they ought to have to pay sales tax."

PLAINTIFF'S EXHIBIT 77

[State Seal]

STATE OF ALABAMA
Governor's Office
Montgomery 36130

For Immediate Release

January 29, 1990

Contact: Terry Abbott
Stacey Rimer
242-7150

GOV. HUNT WANTS CAP ON HAZARDOUS WASTE,
HIGHER FEES, SAYS 'NO' TO INCOME TAX IN-
CREASE

MONTGOMERY: Alabama needs higher fees for dump-
ing hazardous waste and limits on dumping to protect the
state's environment, but taxpayers don't need higher
income taxes, Gov. Guy Hunt said Monday.

Responding to reporters' questions about a legislator's
proposal to shelve his plan to raise money for the state's
General Fund while curtailing hazardous waste dumping,
Gov. Hunt said he believes his plan is "much the better."

A proposal by state Rep. Taylor Harper of Grand Bay
would help balance the state's budget by increasing many
Alabamians' income tax payments to the state while mak-
ing only a small adjustment in the fee for dumping haz-
ardous waste in Alabama.

"We think that our proposals are much the better,"
Gov. Hunt said of his plan, which would increase the fee
for dumping hazardous waste by \$85 a ton on out-of-state
shipments and \$50 a ton on waste produced in Alabama.

Gov. Hunt also is proposing a bill to "cap" the dump-
ing of hazardous waste in Alabama at 650,000 tons this

year and reduce the dumping annually until the dump-
ing reaches a maximum 350,000 tons in 1993.

"We need to do two things. We need to stop the in-
crease in hazardous waste and lower it, as we tried to
do with our cap bill that did not come out of House
Judiciary (committee) last year," Gov. Hunt said.

Gov. Hunt proposes using the increased fees on haz-
ardous waste dumping to partially fund law enforcement
needs, state social service programs, the prison system
and pay raises for state employees for a couple of years
while lawmakers work on reforms of the tax system.

"If people are serious about tax reform next year, then
(the impact of the higher fees on the budget is) some-
thing that can be looked at there," Gov. Hunt said. "In
the meantime, we've got to do something to stop the flow
of hazardous waste into this state, to force other states
to get their incinerators and do their job that they ought
to do and that we've got a right to expect them to do.
I'd be tickled to death to get both that increase and the
cap bill" signed into law, the governor said.

The governor said it is wrong to think that the in-
crease will make Alabama too dependent on hazardous
waste fees. He said Alabama has no real competition
for the hazardous waste and that the state should raise
its fees and impose limits on dumping to force other
states to use waste incinerators and other technology to
take care of their own problems.

Gov. Hunt also opposes Mr. Harper's hazardous waste
bill because it would allow 950,000 tons of hazardous
waste to be dumped in the state each year.

"What his proposal is is that we allow 400 pounds for
every man, woman and child in the state to come in,"
the governor said of Mr. Harper's plan.

Gov. Hunt said rather than Mr. Harper's plan to
increase Alabamians' income tax payments to the state, he

would rather see the state extend the sales tax on mail order sales as 20 other states have done.

"If someone orders a hundred dollars worth of trees . . . if California is going to charge sales tax, then Alabama can charge sales tax," Gov. Hunt said. "We think that that's much better than messing with the income tax at this particular point in time."

Gov. Hunt is proposing the mail order sales tax as an alternative to Mr. Harper's reported plan to cut income tax deductions, therefore increasing the income tax burden of thousands of Alabamians.

"These (companies outside Alabama) are competing with in-state firms that pay sales tax and they ought to have to pay sales tax," Gov. Hunt said of the mail order tax plan.

PLAINTIFF'S EXHIBIT 80

STATE OF ALABAMA
Governor's Office
Montgomery 36130

[State Seal]

For Immediate Release

April 17, 1990 -

Contact: Terry Abbott
Stacey Rimer
242-7150

GOV. HUNT INCREASES HAZARDOUS WASTE DUMPING FEE

MONTGOMERY: Gov. Guy Hunt, declaring "there are no more environmental bargains to be found here," signed legislation Tuesday sharply increasing the fees for dumping hazardous waste in Alabama, a law he called "one of the most important pieces of environmental protection legislation in our state's history."

Gov. Hunt, in a State House ceremony, signed into law a bill raising the dumping fees to \$40 a ton for hazardous waste generated inside Alabama and \$112 a ton for waste shipped in from outside the state.

"Sunday is Earth Day, a day set aside to remember the importance of protecting our environment. In Alabama we are going to start celebrating early by signing into law one of the most important pieces of environmental protection legislation in our state's history," Gov. Hunt said at the news conference.

The governor said the new law eventually will force a reduction in the amount of hazardous waste dumped in Alabama by making it less profitable for waste producers to ship to Alabama.

"For many years Alabama has been the hazardous waste dumping ground of the nation. In Sumter County is the largest toxic waste dump in the world, and last year almost 800,000 tons of hazardous chemicals were dumped there," Gov. Hunt said.

"Although the dump at Emelle is probably one of the safest such facilities in the country, many believe it is a ticking toxic time bomb. In 20 or 30 or 50 or 100 years it may leak and pose a much greater threat to the safety of generations to come," the governor said.

"Today we will take an important step toward scratching Alabama's name off that list of favorite places to dump hazardous waste," he said. "On the day I took office just over three years ago, toxic waste producers in other states could drive their problems to Alabama and dump them for only \$6 a ton. But today, Alabama is taking down that sale sign. With this law it's going to cost \$112 a ton to bring hazardous waste into Alabama from other states. Let the message go out. There are no more environmental bargains to be found here."

Gov. Hunt said that "in time, this sharp increase in dumping fees will force other states to start doing a better job of taking care of their waste problems. They have the technology available to them now, but they have never had the incentive to use it because Alabama has always welcomed their dumping with open arms.

"When this bill was being debated, some in the hazardous waste business warned that this would dramatically reduce dumping in Alabama. Good! That's what we want to do," Gov. Hunt said. "And if it is reduced, we're going to make sure it stays that way. An important provision in this bill will cap the amount of hazardous waste that can be dumped in Alabama at whatever amount is brought to the state over the next 12 months. In other words, if the new law cuts dumping from 800,000

tons to 100,000 tons, then that's going to be the limit on dumping in Alabama."

"This bill will, in time, force a reduction in the amount of hazardous waste produced by those firms, and it will require states to start using incinerators and other methods for disposal that are safer than landfilling," Gov. Hunt said.

Gov. Hunt said in the meantime the fees from the new law will help to balance the state's General Fund budget, "and give the Legislature time to do what it says that it wants to do: reform Alabama's tax system."

The governor said: "This day, as Earth Day approaches and Tax Day has passed for another year, will be remembered as the day that the environment and the taxpayers got a break."

The new law marks the third time in three years that Gov. Hunt has increased the fees for dumping hazardous waste in Alabama. Gov. Hunt also signed legislation banning shipments from states that do not accept hazardous waste, and entered into a compact with four other southern states to better manage the flow of hazardous waste.

DEFENDANTS' EXHIBIT 14

GAO

United States General Accounting Office
Report to the Congress

June 1990

HAZARDOUS WASTE

Funding of Postclosure
Liabilities Remains
Uncertain

[GAO Seal]

GAO/RCED-90-64

GAO

United States
General Accounting Office
Washington, D.C. 20548

Resources, Community, and
Economic Development Division

B-237563

June 1, 1990

To the President of the Senate and the
Speaker of the House of Representatives

The Superfund Amendments and Reauthorization Act of 1986 directed that we study options for a program to manage liabilities associated with hazardous waste disposal facilities after closure which complements the policies set forth in the Hazardous and Solid Waste Amendments of 1984 and assures the protection of human health and the environment. This report presents the results of our review by discussing

- the likelihood that permitted hazardous waste disposal facilities will leak after closure.
- the magnitude of liabilities that may be incurred.
- the adequacy of current postclosure funding assurance requirements, and
- the feasibility of other mechanisms that could provide greater postclosure funding assurances.

* * * *

/s/ J. Dexter Peach
J. DEXTER PEACH
Assistant Comptroller General

EXECUTIVE SUMMARY

Purpose

Although past land disposal of hazardous waste has resulted in major environmental contamination and serious health effects, land disposal of these wastes continues. About 13 million metric tons of hazardous waste is land disposed each year. Better disposal practices—including treatment of wastes to reduce toxicity—and containment methods are now required at operating hazardous waste disposal facilities; nevertheless, the possibility exists that hazardous substances will eventually leak from these facilities and costly cleanup actions would be required to protect the public health and environment.

Concerned about the funding of long-term liabilities—costs, damages, or other expenses—that may be associated with permitted hazardous waste facilities once they have closed, the Congress required GAO to conduct a study of options for managing postclosure liabilities. GAO focused its study on the extent and magnitude to which postclosure liabilities are expected to occur at permitted facilities when closed and the need for, and viability of, options for funding these liabilities.

Background

The Resource Conservation and Recovery Act (RCRA) regulates the management and disposal of hazardous waste. As implemented by the Environmental Protection Agency (EPA), the act requires owners/operators of disposal facilities to obtain an operating permit in order to continue waste disposal operations. To obtain a permit, facilities must meet certain standards intended to prevent and/or detect leakage to the environment. About 200 land disposal facilities have, or are expected to obtain, operating permits.

After a disposal facility ceases operation, EPA requires that closure activities be performed, including the installation of covers over the disposed waste. EPA further requires the owner/operator to perform maintenance and monitoring activities at the facility for a 30-year postclosure period. Owners/operators must provide financial assurance that funds will be available to conduct mandatory postclosure activities.

Certain liabilities, such as costs for cleanup and third-party damages, may result during postclosure if facilities leak and contaminate the groundwater. A postclosure liability trust fund to manage these costs was established under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). However, concerned that, as structured, the postclosure fund may not provide sufficient resources, the Congress suspended the transfer of any liability to the fund.

Results in Brief

The long-term effectiveness of current land disposal practices in controlling the migration of hazardous waste is not known, but EPA and others believe it is likely that some of the permitted hazardous waste disposal facilities will release hazardous substances into the environment at some period after they close. However, the timing and magnitude of any resulting postclosure liabilities—such as the costs of corrective action and off-site damages—are uncertain.

Although EPA is aware of the potential for releases, it has not developed a strategy for addressing long-term postclosure concerns. EPA has given this issue a low priority in the RCRA program because of limited resources and the lack of historical data on the magnitude and extent of the potential problem.

EPA does require funding assurances for mandatory postclosure care and known corrective action costs,

but it does not require funding assurances for potential but unknown postclosure liabilities. Although there are several options for funding postclosure liabilities, few of these are currently viable in large part because the risk associated with closed hazardous waste facilities is difficult to quantify. As data on long-term risks become available, the Congress will be in a better position to decide on the need for additional postclosure funding mechanisms.

Principal Findings

Extent of Liabilities Uncertain

EPA requires facilities obtaining operating permits to design and construct disposal units with waste migration prevention measures, such as liners and covers, intended to mitigate releases into the environment. Little experience-based data exist, however, on the long-term performance of these technology requirements in preventing waste migration. Although at least one company producing liner and cover material estimates that the material will last hundreds of years, EPA and others believe that permanent containment of wastes is not possible and that leakage will occur at some time after the 30-year postclosure period. (See ch. 2.)

When leakage occurs, liabilities could be incurred for extended maintenance and monitoring, compliance monitoring, corrective action, and third-party damages. However, the extent of any liabilities will be contingent on factors that cannot currently be assessed, such as the rate and timing of leakages, the magnitude of contamination by hazardous substances, and the exposure to such contamination.

EPA officials have identified activities, such as extended postclosure care and long-term research, that may be required to identify and reduce the potential for leakage after facilities close. However, EPA has

not developed a strategy to comprehensively obtain data on the effectiveness of current disposal requirements and examine long-term postclosure issues because (1) experience with current disposal requirements is limited and (2) available resources have been needed in other RCRA program efforts that address more immediate environmental concerns. Such a strategy needs to be developed and implemented in a timely manner in order to assure that actions needed to reduce postclosure concerns are promptly taken.

Funding Mechanisms Questionable

Owners/operators are liable for any postclosure costs that may occur. However, few funding assurances exist for postclosure liabilities. EPA only requires funding assurances for maintenance and monitoring costs for 30 years after closure and corrective action costs once a problem is identified. No financial assurances exist for potential but unknown corrective actions, off-site damages, or other liabilities that may occur after the established postclosure period. EPA could require funding assurances for certain potential liabilities, but it does not believe it would be appropriate to require a facility to provide funding assurances for liabilities that may not occur. (See ch. 3.)

Options such as insurance and risk pooling could be pursued to better assure funding of postclosure liabilities; however, their availability is limited because the risks involved with postclosure are viewed as high and very difficult to assess and quantify. Federally administered programs—such as a modified postclosure trust fund or federal insurance—could also be established; however, the appropriate structure for any such program cannot be assessed because of the lack of data on the extent and magnitude of postclosure liabilities. Such information can only

be obtained when EPA implements a strategic plan for developing data and measures to assess postclosure risks. As EPA collects and analyzes the data, the need for and structure of a postclosure funding mechanism can be better determined.

It is important that EPA deal with the issue of long-term postclosure liability in an orderly, reasonable, and timely manner. GAO anticipates that EPA can develop a strategic plan to address the postclosure liability issue in time for the debate on the reauthorization of CERCLA which is expected in 1991. Moreover, EPA should be prepared to take interim measures—such as extending the postclosure care period—to provide greater protection to the public health and the environment until more definitive data are developed.

Recommendation

GAO recommends that the Administrator, EPA, develop and implement a strategy to address the long-term effectiveness of current hazardous waste disposal requirements so that decisions can be made about postclosure liability funding mechanisms. Such a strategy should outline the activities EPA needs to undertake and/or complete to assess postclosure risks, evaluate actions such as extended postclosure care to reduce risks, and assess available alternatives for funding postclosure liabilities. The strategy should also identify required EPA resources and establish time frames for completing such activities. Further, GAO recommends that the Administrator periodically report to the Congress the agency's progress in obtaining the necessary data on the effectiveness of current disposal requirements and as information becomes available, be prepared to take interim measures to provide greater public protection until more definitive data are developed.

* * *

Chapter 1

INTRODUCTION

As evidenced by the events at Love Canal, Times Beach, and thousands of other sites contaminated by hazardous wastes, land disposal of these wastes presents a significant threat to human health and the environment. Hazardous waste disposal can contaminate the land as well as ground and surface waters. Once contaminated, cleanup of a hazardous waste site can cost millions, take many years to complete, and in some cases it may not be possible to remove all contamination. Moreover, many contaminants are toxic, may lead to cancer, or have other adverse human health effects.

Despite the acknowledged problems of hazardous waste, land disposal of some of these wastes continues. About 275 million metric tons of hazardous waste are managed annually. Although a national hazardous waste management program has been established to minimize the disposal and environmental impacts of hazardous waste, about 13 million metric tons are still land-disposed each year.

Current Hazardous Waste Disposal Program

Through the enactment of the Resource Conservation and Recovery Act (RCRA), the Congress imposed strict controls over hazardous waste to protect human health and the environment. Subtitle C of RCRA establishes a "cradle-to-grave" system for managing hazardous waste from the time it is generated until its ultimate disposal. This system regulates the generation, transportation, treatment, storage, and disposal of hazardous wastes.

* * *

The hazardous waste facilities of greatest concern are land disposal facilities—facilities that place the

wastes in the ground for permanent burial. RCRA established strong controls over hazardous waste disposal facilities to prevent the recurrence of past leakage problems. The act requires any owner/operator of a hazardous waste disposal facility to obtain a permit to operate. Further, land disposal facilities must meet certain standards for construction, operation, and closing of the facility in order to obtain the permit and remain in compliance with the permit conditions.

* * *

Requirements for Postclosure

As part of the regulation of hazardous waste under RCRA, EPA established closure and postclosure requirements for owners/operators of disposal facilities. Closure is the period when wastes are no longer accepted at a facility, and during which the owner/operator must properly apply final covers to or cap the landfill, decontaminate or remove all contaminated equipment and structures, and certify that the facility has been properly closed. These activities are required to ensure that facilities are closed in a manner that (1) minimizes the need for additional care and (2) controls, minimizes, or eliminates the potential escape of hazardous substances to the environment.

To assure that hazardous waste land disposal facilities do not pose environmental or public health hazards after closure, such facilities must enter into a postclosure care period. During this period, owners/operators conduct maintenance and monitoring activities to ensure the integrity of the facility. As required by EPA, postclosure care consists of at least

- groundwater monitoring and reporting,
- maintenance and monitoring of the waste containment systems, and

- security around the facility when access may pose a hazard to human health.

EPA requires that these postclosure activities be conducted for a 30-year period following the closure certification. All disposal facilities must develop a plan outlining the postclosure activities and have the plan approved by EPA. Further, owners/operators must prepare postclosure cost estimates and demonstrate the financial ability to pay these costs before they can obtain a permit.

Despite the protective measures now required at facilities and the requirements for postclosure care and monitoring, longstanding concerns exist over the liabilities that could occur after closure and the ability of owners/operators to pay for such liabilities. The Congress addressed this issue with the enactment of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). The act, which established the Superfund program, also established a Postclosure Liability Trust Fund (PCLTF) to assume the liabilities at permitted hazardous waste disposal facilities after closure. Liability would be transferred to the fund within 5 years after closure and after demonstration of no likelihood of migration or release. After transfer of liability, the fund, generated from a tax on disposed hazardous waste, would pay for damages, such as groundwater contamination and necessary cleanup actions, resulting from a release. The fund would also pay for monitoring and maintenance beyond the 30-year postclosure period. The balance in the fund was limited to \$200 million, although additional taxes could be collected if the balance dropped below that amount.

However, concerns about PCLTF and the unlimited liability that could be transferred to the government were raised in the deliberations on reauthorizing CERCLA in 1985. In particular, the Congress and EPA were concerned that the fund would not have sufficient resources to pay the liabilities. Subsequently, under Section 201 of the Superfund Amendments and Reauthorization Act (SARA), the Congress suspended the transfer of liability to the PCLTF. Further, the Congress repealed the tax and the trust fund and authorized the refund of the amounts collected to the owners/operators who had paid into the fund. CERCLA will be up for reauthorization in 1991.

Objectives, Scope, and Methodology

With the repeal of the Postclosure Liability Trust Fund, the Congress required us to study options for a program to manage postclosure liabilities. SARA Section 201 established the general requirements that a postclosure program should assure (1) incentives are created and maintained for the safe management and disposal of hazardous wastes, (2) the public will have reasonable confidence that hazardous wastes will be managed and disposed of safely and resources will be available to address any problems that may arise and will cover the costs of long-term care, and (3) owners/operators of hazardous waste disposal facilities will be able to manage their potential future liabilities and attract investment capital necessary to build, operate, and close such facilities in a manner that assures protection of human health and the environment. Another provision of section 201 was that separate assessments be made for different classes of treatment, storage, and disposal facilities that have been or probably will be issued a permit. Such assessments were to address the current and future financial capabilities of owners/operators, the current and future costs associated with facilities,

and the availability of mechanisms to assure these costs can be financed.

In conducting our study, we found that several of these requirements could not be fully addressed. As discussed later in this report, data necessary to assess future costs and financial capabilities are not available. Consequently, to best address the overall issue of postclosure liability and provide the Congress now with a meaningful perspective on liability questions, we focused our work on addressing the following questions.

- What is the likelihood that permitted hazardous waste disposal facilities will leak in the post-closure period and/or beyond?
- What is the magnitude of liabilities that may be incurred after these facilities close?
- Do current mechanisms provide adequate funding assurances for these liabilities?
- How feasible are other mechanisms that could be used to provide greater assurance that funds will be available to address postclosure liabilities?

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In addressing these issues, we relied primarily on information from EPA's Office of Solid Waste (OSW), which is responsible for managing the RCRA program, and contacted other government agencies such as the Departments of Commerce, Treasury, and the Interior and the Federal Emergency Management Agency (FEMA) and the Nuclear Regulatory Commission (NRC) concerning various aspects of our review. In addition, we gathered opinions and data on the postclosure liability issue from two environmental groups and the commercial hazardous waste

management and treatment industries' associations. We also spoke with owners/operators of hazardous waste facilities, including one who both generates and disposes of hazardous waste and others who only treat and/or dispose of hazardous waste.

* * * *

Chapter 2

EXTENT OF POSTCLOSURE LIABILITIES UNKNOWN

EPA requires permitted facilities to meet certain requirements intended to prevent the leakage of hazardous substances into the environment. The requirements for liners, leachate collection systems, covers, and postclosure maintenance are believed capable of preventing leakage in the short term. However, for the long term—beyond 30 years—there are questions about the effectiveness of EPA's current requirements and concerns that leakage may occur.

Leakage that does occur after closure could result in significant liabilities such as corrective action costs and off-site damage claims. However, because of a lack of experience-based information, insufficient data exist on the extent and timing of potential leakage as well as the actions required to correct such leakage. Consequently, the magnitude of postclosure liabilities that could be incurred simply cannot be measured at this time.

EPA is concerned about the effectiveness of its standards for the long-term prevention of waste migration and the potential for postclosure liabilities. Both GAO and EPA's Science Advisory Board have recommended the development of a strategy—describing activities and time frames for their completion—to address such concerns. However, because postclosure at currently operating hazardous waste disposal facilities is not viewed as a current environmental problem, EPA has made this issue a lower priority in the RCRA program and has not developed the necessary strategy.

Current Requirements May Not Prevent Leakage After Postclosure

The land disposal of hazardous waste presents the possibility that hazardous substances may migrate

from the disposal facility and pose a risk to human health and the environment. To reduce this risk before the wastes are placed in the ground, hazardous waste must meet specified treatment standards to make it less toxic and mobile. HSWA prohibits the disposal of untreated hazardous wastes beyond specified dates and requires EPA to establish treatment standards after which waste treated in accordance with the standards could be land disposed. Treatment standards have been established for most hazardous wastes and standards for all remaining wastes are scheduled for issuance in May 1990.

Nevertheless, although some wastes degrade or can be made less hazardous through treatment, some substances remain hazardous forever. Consequently, in order to reduce the potential for leakage of these substances from permitted disposal facilities after they close, all such facilities must meet a number of construction standards to prevent and/or reduce the migration of hazardous wastes. These standards require, according to EPA guidance, that all owners/operators must do the following:

- Place double liners under any new landfill unit or any replacement or expansion of an existing unit.¹ Draft EPA guidance for double liners directs that the top liner be constructed of a flexible synthetic material, such as high-density polyethylene, and the bottom liner be constructed of either compacted low-permeability soil or a combination of a synthetic material and compacted low-permeability soil.
- Install leachate collection systems over the top liner and between the two liners. Leachate collection systems consist of a drainage layer to collect liquids generated in the disposal unit and a mechanism such as a pump to remove them.

- Cover the disposal units at closure. EPA's minimum technology guidance recommends that covers be of a multilayer design that includes a synthetic material and compacted soil.

* * *

Long-Term Effectiveness of Waste Containment Measures Unknown

Under the current requirements, hazardous waste disposal units are expected to be effective in preventing leakage of hazardous constituents into the environment through the 30-year postclosure period. EPA's design and operating requirements for land disposal units specify that liners be constructed of materials to prevent the migration of any hazardous constituent through the liner during a unit's active life and postclosure period. The chief of OSW's Disposal Technology Section said that although little data are available on the actual use of liners in hazardous waste applications, EPA is confident that the current technology will be effective in preventing waste migration through the 30-year postclosure period. He said that properly closed units, with the required maintenance and leachate removal, will gradually "dewater" and dry out during the early years of postclosure and substantially reduce the likelihood of leakage during the 30-year postclosure period.

However, for the longer term—beyond the 30-year postclosure period—the effectiveness of the current technology requirements in preventing leakage is questionable. As stated in EPA's March 1986 proposed rule to assist in implementing the statutory provisions of HSWA

"EPA's position was, and still is, that absolute prevention of migration forever, or for the long term, is beyond the current technical state of the art. Thus,

at some time, some migration through the liner will probably occur."

* * *

University researchers we talked with also said that problems may exist with the long-term effectiveness of current waste containment technology. One researcher said that there is little doubt that current hazardous waste facilities will leak. He said that present research shows that these systems will fail at some point, particularly after postclosure care ends, and that he views today's disposal of hazardous waste as merely a storage mechanism for hazardous waste that may have to be removed eventually. Another university researcher told us that the technology used today is the best available but that it is simply unknown if it will keep wastes in place.

Magnitude of Postclosure Liabilities Not Determinable

Postclosure liabilities are for the most part directly related to the leakages that may occur before and after a facility closes. Only one postclosure liability—maintenance and monitoring—is required in all situations and can be estimated. Other postclosure liabilities that may be incurred—compliance monitoring, corrective action, third-party damages, and natural resource damages—cannot be determined because of the unknown extent and timing of potential leakages and, in some cases, a lack of available data.

* * *

Natural Resource Damages

Leakage from hazardous waste facilities could also result in damages to natural resources. As defined by CERCLA, natural resources are land, fish, wildlife, biota, air, water, groundwater, and other such resources belonging to or otherwise controlled by the

United States, any state or local government, or any foreign government.

* * *

EPA Does Not Have a Strategy for Addressing Long-Term Postclosure Concerns

* * *

The need for strategic planning in the area of hazardous waste disposal has also been raised by EPA's Science Advisory Board, a public advisory group that provides advice to EPA. In an October 1987 report on EPA's land disposal research program, the Board determined that it is difficult to predict that improved land disposal will be protective of human health and the environment for the long-term future. The report concluded that there is a need to evaluate and understand the long-term performance of what are now considered environmentally sound land disposal practices to ensure that these practices are environmentally sound for many decades. The report further concluded that there is an absence of a waste management strategy—detailing projects, timetables, and funding—necessary to develop the scientific and technical knowledge for developing land disposal guidance and regulations.

According to EPA officials, a comprehensive strategy for addressing long-term postclosure concerns at permitted hazardous waste facilities has not been developed. The officials stated that no strategy exists in large part because postclosure concerns at operating facilities currently have a low priority relative to other aspects of the RCRA program. They pointed out that EPA is conducting several activities that have statutorily mandated deadlines, such as the permitting of incinerators and the issuance of hazardous waste treatment standards and that these activities have been given high priority by EPA. One official added that the remaining EPA resources are directed

at issues that provide the most environmental benefit and that postclosure concerns at operating facilities is not a current environmental problem.

* * *

No Financial Assurance Requirements for Unknown Liabilities

Postclosure financial assurance is currently required by EPA only for 30-year maintenance and monitoring as well as identified corrective action costs. Financial assurances are not required, however, for potential but unknown postclosure liabilities such as on-site cleanup or off-site damages. According to the Director, Permits and State Programs Division, EPA only requires owners operators to set aside funds for known contingencies: EPA does not believe it would be appropriate to require funds be set aside for unknown contingencies. Consequently, although EPA does not want situations to occur in the future where funds are not available to cover liabilities, it does not require large amounts of funds be set aside for liabilities that may not occur. The director added that such additional financial responsibility requirements could cause facilities to close, which would have serious negative effects such as reducing hazardous waste disposal capacity and increasing illegal dumping.

Nevertheless, osw officials stated that there is no assurance that funds would be available for unknown liabilities that may occur after permitted facilities close. They said that no one can predict what the future financial situation of any owner operator will be in the long-term with any certainty, and if an owner operator were to become bankrupt or otherwise go out of business, there is little likelihood that funding would be available for unanticipated postclosure costs.

* * *

EPA has the authority to require additional financial assurances for certain unknown liabilities. Section 3004(a) of RCRA authorizes EPA to promulgate financial requirements for corrective action as it deems necessary or desirable. According to EPA, this authority is not limited to known releases. However, although EPA has issued a proposed corrective action rule in October 1986 that would require facilities with known releases to provide corrective action funding assurances, at that time EPA stated that it will not pursue such financial assurances for unknown releases until more analysis on the issue is completed.

* * *

Private Sector Options

Private sector options for funding postclosure liabilities include private insurance, coinsurance, reinsurance, and voluntary risk pooling. Because of the unknown liabilities and perceived risk associated with hazardous waste disposal facilities after they close, these postclosure funding mechanisms are currently not viable options. Private insurance, coinsurance, and reinsurance are currently unavailable for postclosure liability coverage. Voluntary risk pools to cover postclosure liabilities have proved to be unsuccessful and are generally believed inappropriate for the hazardous waste disposal industry.

Private insurance has been unavailable for closed hazardous waste facilities for many years.

* * *

A representative of the American Insurance Association stated that the postclosure insurance market does not exist, and they did not foresee that this market would open up anytime in the near future. According to the representative, the unavailability of

private hazardous waste insurance is primarily due to the following factors.

- The inability to measure or quantify the liability exposure at hazardous waste facilities along with a perception by the insurance industry that liabilities are certain to occur after these facilities close.
- An unwillingness by the industry to guarantee coverage on a perpetual, noncancellable basis to cover the entire 30-year postclosure period.
- The financial liability of the insurance industry in the pollution arena, where the conduct of the policyholder is no longer relevant and insurers would be ultimately liable for cleanup costs.

EPA has also determined that private insurance for postclosure is not available. In its October 1986 proposed rule for corrective action, EPA indicated that it was aware of only one company that had offered postclosure insurance and that this company stopped offering such insurance as of 1986.

* * *

Neither coinsurance nor reinsurance is a viable option for assuring postclosure liability funding. As stated in the 1982 Treasury study, other private sector insurance arrangements such as coinsurance and reinsurance encounter many of the same shortcomings as private insurance, and consequently these options are not feasible in the foreseeable future. The senior economist responsible for the study told us that the feasibility of both coinsurance and reinsurance is dependent upon the existence of a robust private insurance market to cover these liabilities. As previously discussed, this market does not exist.

As discussed in our October 1987 report, the availability of reinsurance for hazardous waste facilities

has been limited since 1984, when foreign reinsurers began to leave the reinsurance market. A representative of the American Insurance Association stated that the association does not expect a resurgence in the reinsurance market for pollution liabilities.

Voluntary Risk Pooling

A risk pool is a group of riskbearers who spread and finance losses among themselves when private insurance is not available or prohibitively expensive.

* * *

As discussed in the 1982 Treasury report, risk pooling is not a viable option for postclosure liability funding. Because postclosure liability is uncertain and potentially unlimited, Treasury determined that underwriting the risk of postclosure is no more acceptable to mutual associations than to individual insurance companies.

Representatives of hazardous waste disposal firms and NSWMA also pointed out that risk pooling was not a practical option for postclosure liabilities.

* * *

However, although postclosure liabilities at hazardous waste facilities are difficult to estimate and private insurance is generally not available, federal insurance officials do not believe that it is an area for federal insurance coverage. Officials from FEMA's Federal Insurance Administration (FIA) said that federal insurance may not be appropriate for postclosure liabilities at hazardous waste disposal facilities. The FIA officials cited a number of concerns with establishing a viable postclosure liability insurance program, including the following.

- The lack of actuarial experience with postclosure liability costs. The officials said that with flood insurance, for example, risks can be quantified

based on historical data. However, the lack of experience-based data on postclosure liabilities makes it difficult to quantify the risks, costs, and coverage.

- Coverage of bodily injury claims. The federal insurance programs FIA administers have been limited to property damage only, and it is more difficult to quantify the risks associated with bodily injury and potentially more expensive.
- Certainty of risk. The possibility exists that even if facilities are built to current standards leakage will occur.
- The need for perpetual insurance coverage. In other areas insurance has a time limit, but postclosure coverage would be forever.

FIA's Deputy Administrator added that federal insurance is usually provided as a mechanism to influence behaviors and to achieve certain objectives while at the same time providing insurance coverage. For example, to obtain flood insurance, buildings must be built to certain standards which reduce the likelihood of flood damage. However, hazardous waste facilities already have to meet high standards for construction and maintenance, and therefore it appears that insurance is not needed to change the behaviors of facility owners/operators.

* * * *

EPA, however, does not believe that a modified postclosure trust fund would be appropriate federal policy. According to the Director, Permits and State Programs Division, a federal trust fund runs counter to the objectives of HSWA, which establishes the federal policy of discouraging the land disposal of hazardous waste. He said that a trust fund would serve as an incentive to land disposal of these wastes and could result in increase disposal capacity, which is currently not needed nor is it desired by EPA.

DEFENDANTS' EXHIBIT 40

November 1987

EPA-700/8-87-036

*Hazardous Waste Ground-Water
Task Force*

*Evaluation of
Chemical Waste Management, Inc.
Emelle, Alabama*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
[EPA Seal]

ADEM

ALABAMA
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

[State Seal]

INTRODUCTION

Concerns have recently been raised about whether commercial hazardous waste treatment, storage and disposal facilities (TSDFs) are complying with the ground-water monitoring requirements promulgated under the Resource Conservation and Recovery Act (RCRA). In question is the ability of existing or proposed ground-water monitoring systems to detect contaminant releases from waste management units. To evaluate these systems and determine the current compliance status, the Administrator of the Environmental Protection Agency (EPA) established a Hazardous Waste Ground-Water Task Force (Task Force). The Task Force comprises personnel from the EPA Office of Solid Waste and Emergency Response (OSWER), National Enforcement Investigations Center (NEIC), Regional Offices and State regulatory agencies. The Task Force is conducting in-depth on-site investigations of commercial TSDF's with the following objectives:

- Determine compliance with interim status ground-water monitoring requirements of 40 CFR Part 265 as promulgated under RCRA or the State equivalent (where the State has received RCRA authorization).
- Evaluate the ground-water monitoring program described in the facility's RCRA Part B permit application for compliance with 40 CFR Part 270.14(c).
- Determine if the ground water at the facility contains hazardous waste constituents.
- Provide information to assist the Agency in determining if the TSDF meets EPA ground-water monitoring requirements for waste management facilities receiving waste from response actions conducted under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, Public Law 91-510).

To address these objectives, each Task Force investigation will determine if:

- The facility has developed and is following an adequate ground-water sampling and analysis plan;
- Designated RCRA and/or State required monitoring wells are properly located and constructed;
- Required analyses have been conducted on samples from the designated RCRA monitoring wells; and
- The ground-water quality assessment program outline (or plan, as appropriate) is adequate.

During September 15-25, 1986, a Task Force team conducted an evaluation at the Chemical Waste Management Incorporated (CWM) facility (EPA I.D. No. ALD000622464) at Emelle, Alabama (Figure 1). The inspection was coordinated by US-EPA Region IV Environmental Services Division (ESD) and consisted of personnel from ESD as well as US-EPA Headquarters, the US-EPA Region IV Residuals Management Branch, the Alabama Department of Environmental Management (ADEM), and GCA Corporation, who was the sampling contractor for this evaluation. In general the inspection involved review of state, federal, and facility records, facility inspection, laboratory evaluation and ground-water and landfill leachate sampling and analyses.

BACKGROUND

Based primarily on geological criteria, a group of investors, known as Resource Industries of Alabama (RIA) acquired a tract of land which would become the Chemical Waste Management, Inc. facility at Emelle, Alabama. Under the authority of the Alabama Solid Waste Disposal Act No. 771, Regular Session, 1969, the Director of the Division of Solid Waste and Vector Control (Environmental Health Administration) issued a permit to RIA for construction and operation of a hazardous waste dis-

posal facility on May 4, 1977. Permitted waste types were solids and liquids categorized as potentially hazardous or toxic, except radioactive wastes and normal domestic and commercial waste. After meeting the conditions of the permit, RIA was given final approval for operation of a landfill on August 24, 1977. Immediately thereafter, the site began receiving waste.

Effective February 23, 1978, the RIA site was re-permitted as Waste Management of Alabama, a subsidiary of Waste Management, Inc. They then filed a formal application with US-EPA dated March 10, 1978, for a landfill disposal permit for polychlorinated biphenyls (PCBs). This application was approved and accordingly issued by US-EPA on June 28, 1978, and modified in October, 1979 to allow disposal of liquid PCBs.

Hazardous waste permit responsibilities reverted to US-EPA on November 19, 1980 when federal regulations under the Resource Conservation and Recovery Act of 1976 became effective. On November 14, 1980, Chemical Waste Management Inc. obtained Interim Status under RCRA by filing a complete Part A application form prior to November 19, 1980.

US-EPA Region IV requested the Emelle facility's Part B application on February 8, 1983. In response, Chemical Waste Management made their original submission on September 9, 1983, and final revisions were accomplished in August 1986. The application was deemed complete in July, 1986, and at the time of the Task Force evaluation, a draft permit was on public notice.

* * * *

* * * *

GROUND WATER MONITORING UNDER 40 CFR PART 264

Upon issuance of their Federal RCRA permit, CWM will no longer be required to conduct monitoring of the Eutaw Formation as they have been under interim status. The State permit, however, will require CWM to continue to monitor the Eutaw. CWM submitted a waiver request in their Part B demonstrating that there is virtually no potential for migration of hazardous wastes or hazardous waste constituents to the Eutaw Formation (uppermost aquifer) within the active life and 30 year closure and post-closure period. The transit time through the Selma chalk was estimated by CWM to be 10,000 years. Independent EPA estimates of transit time using conservative estimates for equation variable were 330 years and 3,000 years for estimates using Darcy's Equation and a 2-D solute transport model, respectively. The very conservative 330-year estimate is considerably longer than the end of the post-closure period.

CWM's Federal RCRA permit will require that the consent agreement monitoring wells be monitored in lieu of the Eutaw wells to determine if there is migration of hazardous waste constituents and confirm the rate of migration should it be detected. Under the permit, these wells will be monitored semi-annually and will be evaluated for contamination using specific, objective criteria.

* * * *

It is difficult to draw any firm conclusions about possible shallow saturated chalk contamination using data from the Task Force evaluation. Of all the data reported from analyses of samples collected at the Consent Agreement and PCB chalk wells, the data for selected metals (arsenic, cobalt, nickel and selenium) and purgeable organic compounds are the most useful. TOC and TOX were the priority conventional parameters and analyses was obtained for these parameters from 11 of 13 and 9 of 13

wells, respectively. These data, however, do not appear to be useful indicators for this evaluation, since the samples from the background well, Well BG-02, were the only samples in which TOC and TOX were detected. It should be stated that this well appears to be located properly with respect to its function as a background or control well, and no explanation can be offered at this time for these apparently anomolous values.

The selected metals data does not indicate a clear pattern with regard to fracture-screened or deep-screened wells. Of the five wells adjacent to trenches in which these metals were detected, two are deep wells, two are fracture wells and one is a PCB well. The PCB wells were generally sited with respect to observed fractures and were completed at depths approximately 25 feet below trench bottoms. If the PCB well in question, M-58, were indeed a fracture well equivalent, then the data might indicate a trend towards higher metals concentrations and greater number of metal compounds occurring in fracture wells.

Of the six purgeable organic compounds detectable in samples collected from Consent Agreement wells, four, two each in wells SM-5 and SM-9, were detected in fracture wells. If the reasoning in the previous paragraph is followed, the compound detected in the sample from well M-56 could also be considered to be from a fracture well sample, indicating that possibly five of six occurrences of purgeable organic compounds were from fracture wells.

It would be unusual, however, if these fractures (e.g. Well SM-5 and SM-9 fractures) are indeed active conduits, that so few organic compounds were detected at the low levels measured (all less than 15 ug/l). The leachate in these trenches is a virtual soup of inorganic and organic compounds. One would expect, given the low levels of detection utilized in these analyses, that more than two purgeable organic compounds would be detected and that extractable organic compounds would have been detected as well.

The Task Force recommends that the following tasks be completed to evaluate the significance and probability of the fractures as conduits for leachate migration.

1. Conduct a trace element geochemical study of the Selma Chalk in the vicinity of the Emelle facility. Samples should be collected from on-site and off-site locations with utmost regard for obtaining pristine samples. The study should include, at a minimum, analysis for the trace metals arsenic, chromium, cobalt, nickel, and selenium. These analyses should look at both total and leachable (e.g. EP Toxicity procedure) concentrations. It is critical that the occurrence and mobility of these metals in the chalk be understood if decisions regarding contamination are to be made on the concentrations of arsenic, chromium and nickel in ground water collected from the Consent Agreement wells. This study should be performed by either EPA or ADEM.
2. Sampling the purgeable organic compounds in the vicinity of active trenches, particularly downwind should be conducted with the highest regard for field quality control and quality assurance. Field blanks should be prepared for purgeable organic analyses at each station where odors and wind blown dust are present during sampling to help evaluate the low level concentrations of organic compounds such as reported for Task Force samples. This task should be performed jointly by CWM and either EPA or ADEM during several regularly scheduled sampling events at CWM. Ideally, samples should be split at the "hot wells" sampled during the Task Force evaluations and any other wells at which purgeable organic compounds have been recently detected or which are in active areas.

These conclusions are speculative and are based on observations made during the Task Force Evaluation. While they are by no means conclusive, they do indicate that some fractures may be conduits for leachate migration from certain trenches.

* * *

DEFENDANTS' EXHIBIT 41

REPORT TO CONGRESS

DISPOSAL OF HAZARDOUS WASTES

This publication (SW-115) was prepared by the OFFICE OF SOLID WASTE MANAGEMENT PROGRAMS as required by Section 212 of The Solid Waste Disposal Act as amended and was delivered June 30, 1973, to the President and the Congress

U.S. ENVIRONMENTAL PROTECTION AGENCY

1974

* * * *

Appendix F

SUMMARY OF THE HAZARDOUS WASTE NATIONAL DISPOSAL SITE CONCEPT

In the course of investigating the NDS concept for hazardous wastes as mandated by Section 212 of the Solid Waste Disposal Act (P.L. 89-272, amended by P.L. 91-512), important and relevant information was developed. Appendixes B and D, respectively, provide a list of hazardous wastes subject to treatment at such sites and summaries of current methods of treatment and disposal. This appendix summarizes the findings related to site selection, methods and processes that are likely to be used at a typical site, and costs for developing and maintaining such sites. An earlier study contains the detailed analyses performed and the rationale for this information.¹

SITING OF HAZARDOUS WASTE TREATMENT AND DISPOSAL FACILITIES

The general approach to the site selection process was to first regionalize the conterminous United States into 41 multicounty regions (spheres of influence for major industrial waste production areas, which are closely related to hazardous waste production areas, served as the basis for regional delineation):

- (1) Seattle, Tacoma, Everett, and Bellingham, Washington
- (2) Portland, Oregon; Vancouver and Longview, Washington
- (3) San Francisco Bay Area, California
- (4) Ventura, Los Angeles, and Long Beach, California
- (5) San Diego, California

- (6) Phoenix, Arizona
- (7) Salt Lake and Ogden, Utah
- (8) Idaho Falls and Pocatello, Idaho
- (9) Denver, Colorado
- (10) Santa Fe and Albuquerque, New Mexico
- (11) El Paso, Texas
- (12) Fort Worth, Dallas, and Waco, Texas
- (13) Austin, San Antonio, and Corpus Christi, Texas
- (14) Houston, Beaumont, Port Arthur, Texas City, and Galveston, Texas
- (15) Oklahoma City, Tulsa, and Bartlesville, Oklahoma
- (16) Wichita, Topeka, and Kansas City, Kansas
- (17) Omaha and Lincoln, Nebraska; Des Moines, Iowa
- (18) Minneapolis, St. Paul, and Duluth, Minnesota
- (19) Cedar Rapids, Michigan; Burlington and Dubuque, Iowa; Peoria, Illinois
- (20) St. Louis, Missouri; Springfield, Illinois
- (21) Memphis, Tennessee
- (22) Shreveport, Baton Rouge, and New Orleans, Louisiana; Jackson, Mississippi
- (23) Mobile and Montgomery, Alabama; Tallahassee, Florida; Biloxi and Gulfport, Mississippi; Columbus, Georgia
- (24) Huntsville and Birmingham, Alabama; Atlanta and Macon, Georgia; Chattanooga and Nashville, Tennessee
- (25) Louisville, Frankfort, and Lexington, Kentucky; Evansville, Indiana
- (26) Albany, Troy, and Schenectady, New York

- (27) Indianapolis, Indiana; Cincinnati and Dayton, Ohio
- (28) Chicago and Kankakee, Illinois; Gary, South Bend, Hammond, and Fort Wayne, Indiana
- (29) Midland, Saginaw, Grand Rapids, Detroit, Dearborn, and Flint, Michigan; Toledo, Ohio
- (30) Columbus, Cleveland, Youngstown, and Akron, Ohio
- (31) Pittsburgh, Johnstown, and Erie, Pennsylvania
- (32) Charleston, West Virginia; Portsmouth and Norfolk, Virginia
- (33) Charleston, South Carolina; Savannah and Augusta, Georgia
- (34) Winston-Salem, Raleigh, Greensboro, and Charlotte, North Carolina
- (35) Baltimore, Maryland
- (36) Philadelphia, Allentown, and Harrisburg, Pennsylvania; Camden and Elizabeth, New Jersey; Wilmington, Delaware
- (37) New York, New York; Newark and Paterson, New Jersey
- (38) Buffalo, Rochester, Syracuse, and Watertown, New York
- (39) Boston, Massachusetts
- (40) Orlando, Tampa, and Miami, Florida
- (41) Little Rock, Pine Bluff, and Hot Springs, Arkansas

Thirty-six waste treatment regions were identified, based upon the distance from the 41 major industrial waste production centers. These are shown in Figure 16. Distances of about 200 miles (322 kilometers) in the East and 250

miles (402 kilometers) in the West were selected as the maximum distances any treatment site should be from the industrial waste production centers in a given sub-region. Some of the regions do not contain an industrial waste production center; however, their boundaries are defined by surrounding regions containing waste production centers. No region was generally permitted to cross any major physiographic barrier. Notably, the regions are smaller in the East than in the West.

Criteria for site selection were defined. The major emphasis was placed on health and safety and environmental considerations. It was recognized early that two general types of sites would need to be identified: waste processing plant sites and long-term hazardous waste disposal and storage sites. Site selection criteria and numerical weightings are presented in Table 12.

Based on the site selection criteria, a ranking, screening, and weighting procedure was developed and applied to all counties located in the 36 regions which cover the country. The county-size areal unit appeared to be of manageable size for the survey. The output listing of all 3,050 counties in the conterminous United States, grouped by regional ratings, is too voluminous for inclusion here.¹ This listing allows for the orderly and rational selection of counties within each region, for site-specific reconnaissance, and for later detailed field studies that would be required in order to prove out the feasibility of a candidate site. From the total list that rates and ranks all counties, 74 appear to be potentially the best areas for locating hazardous waste treatment and disposal sites. These are presented as follows by State:

<i>State:</i>	<i>County:</i>
Alabama	Sumter*
Arizona	Dallas
	Yuma

<i>State:</i>	<i>County:</i>
California	Fresno
	Inyo
	Kern*
	Ventura
Colorado	Weld
Connecticut	Hartford
Florida	Alachua
Georgia	Dooley*
Iowa	Howard
Illinois	Jasper
	Livingston*
	Ogle
	Vermilion
Indiana	Jackson
Kansas	Ellsworth
Kentucky	Franklin
Maryland	Carroll
Massachusetts	Franklin*
	Worcester
Michigan	Isabella*
	Shiawassee
Mississippi	Lincoln
Missouri	Audrain
Montana	Custer
Nebraska	Kearney
Nevada	Nye*
	Pershing
	Washoe
New Jersey	Sussex
New Mexico	Eddy
	Quay
	San Juan
New York	Albany
	Onondaga
	Otsego
	Steuben

* Potential site for large-size processing facility.

<i>State:</i>	<i>County:</i>
	Wyoming
North Dakota	Grand Forks
Ohio	Carroll
	Darke
	Wayne
Oklahoma	Atoka
	Custer
	Kay
Oregon	Deschutes
Pennsylvania	Clinton
	Montgomery
	York*
South Carolina	Barnwell
	Greenwood
Tennessee	Gibson
	Montgomery
Texas	Bell
	Erath*
	Gillespie
	Grimes
	Harris*
	Haskell
	Kendall
	Polk
	Sutton
Utah	Tooele
Virginia	Brunswick
	Caroline
	Fluvana
	Pittsylvania
Washington	Benton
	Lincoln
West Virginia	Doddridge
Wyoming	Campbell
	Laramie

* Potential site for large-size processing facility.

TABLE 12
SITE SELECTION CRITERIA

General criteria	Weighting
Earth sciences (geology, hydrology, soils, climatology)	31
Transportation (risk, economics)	28
Ecology (terrestrial life, aquatic life, birds and wildfowl)	18
Human environment and resources utilization (demography, resource utilization, public acceptance)	23
Total	100

In addition, the following are the existing or potential Federal and State hazardous waste treatment and disposal sites:

Existing sites operated by AEC:

Fernald, Butler/Hamilton Counties, Ohio
 Hanford Works, Benton County, Washington
 Los Alamos Scientific Laboratory, Los Alamos County, New Mexico
 National Reactor Testing Station, Bingham County, Idaho
 Nevada Test Site, Nye County, Nevada
 Oak Ridge, Anderson County, Tennessee
 Pantex Plant, Randall County, Texas
 Rocky Flats Plant, Jefferson County, Colorado
 Savannah River Plant, Aiken County, South Carolina

Existing sites operated by DOD:

Anniston Army Depot, Alabama
 Edgewood Arsenal, Maryland
 Lexington Bluegrass Army Depot, Kentucky
 Newport Army Ammunition Plant, Indiana
 Pine Bluff Arsenal, Arkansas
 Pueblo Army Depot, Colorado
 Rocky Mountain Arsenal, Colorado
 Tooele Army Depot, Utah
 Umatilla Army Depot, Oregon

State-licensed radioactive waste sites: *

Barnwell, South Carolina
 Beatty, Nevada
 Hanford Works, Washington
 Morehead, Kentucky
 West Valley, New York

Data on the Beatty, Nevada; Hanford, Washington; and Morehead, Kentucky, sites are presented in Tables 13 to 15.

It should be noted that the suitability of a particular candidate site can only be determined by additional field studies, field testing, and technical analyses of the data.

* * * *

* The Sheffield, Illinois, site is directly licensed through AEC but is not operated by AEC.

DEFENDANTS' EXHIBIT 57

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EDUCATION

- B.S. Bucknell University, June 1965
Advisor: Richard P. Nickelsen
- M.A. The University of Texas at Austin, August 1967
Advisor: Robert E. Boyer
Thesis: Geology and Fracture Patterns of North-Central Burnet County, Texas
- Ph.D. Brown University, June 1971
Advisor: William M. Chapple
Thesis: Strain in Minor Folds, Valley and Ridge Province, Pennsylvania

PROFESSIONAL EMPLOYMENT

- 1970-1973 Assistant Professor, Syracuse University
- 1973-1976 Research Geologist, Cities Service Co., Tulsa

- 1976-1978 Senior Research Geologist, Cities Service Co., Tulsa
- 1978-1981 Manager, Structural Geology Research, Cities Service Co., Tulsa
- 1981-1982 Adjunct Professor, Tulsa University, Tulsa, Oklahoma
- 1981-1983 Senior Research Associate, Cities Service Co., Tulsa
- 1983-1986 Associate Professor, The University of Alabama
- 1986- Professor, The University of Alabama
- Fall 1988 Visiting Chair d'honneur de l'Université de Lausanne, Switzerland

PROFESSIONAL AFFILIATIONS

- The Geological Society of America (Fellow, 1982)
- The American Geophysical Union
- The American Association of Petroleum Geologists
- Rocky Mountain Association of Geologists
- Alabama Geological Society
- Houston Geological Society

HONORS AND AWARDS

- Fall 1988 Visiting Chair d'honneur de l'Université de Lausanne
- 1989-1990 AAPG Distinguished Lecturer

DEFENDANTS' EXHIBIT 68**PERSONNEL**

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THOMAS J. JOINER,
CHAIRMAN AND CHIEF EXECUTIVE OFFICER

Education: BS, MS—University of Alabama

Experience: 1981-Present

Chairman and founder of the firm, Mr. Joiner supervises and maintains responsibility for all geologic and engineering studies and evaluation work performed by the firm. His experience includes 25 years of working with the geology in Alabama and the southeast United States. He is very familiar with oil and gas and industrial development in Alabama, Florida and parts of Mississippi and Tennessee. He coordinates project work and preparation of reports for clients. Mr. Joiner spends much of his time representing clients before Boards, Commissions and legislative and congressional committees. He is experienced in presenting expert testimony in court and before Oil and Gas Boards and Regulatory Commissions. Mr. Joiner served as Chairman of the Technical Committee for the unitization of the Hatter's Pond Gas Field in Mobile County, Alabama for Getty Oil Company.

1976-1981

State Geologist and Oil and Gas Supervisor—Directed the program of the Survey and Board. Supervised approximately 135 people working out of 4 offices.

Programs included basic and applied research in water, minerals and energy, and environmental problems associated in the development of resources. The oil and gas responsibilities included permitting and monitoring the oil and gas drilling activity in the state and evaluating and approving completion and production procedures.

1968-1976

Assistant Oil and Gas Supervisor—Director of technical operations for the State Oil and Gas Board serving directly under the Oil and Gas Supervisor. Duties included evaluation of petitions before the Board concerning these matters. Acting on behalf of the Supervisor in routine administrative oil and gas matters. Directing field inspections and regulatory activities for the Board. Serving on energy related committees, such as the Outer Continental Shelf Research Advisory Committee, at the request of the Governor and Oil and Gas Supervisor.

1961-1968

Chief, Paleontology, Stratigraphy and Geophysics Division—Geological Survey of Alabama. Work was directly related to evaluation of geologic samples from test wells, electric logs and geophysical data to assess water, mineral and petroleum potential in Alabama. Administrative duties included preparation of agreements for cooperative projects with other State and Federal Agencies, universities, cities, counties and private industry.

1957-1961

Carter Oil Company and Esso Standard Turkey Inc.—both affiliates of Standard Oil Company of New Jersey—Duties included geological and geophysical investigations in search of oil and gas in Arkan-

sas, Louisiana, Oklahoma and a two year assignment in Turkey.

1956-1957

U. S. Geological Survey—Groundwater investigation in Alabama.

* * * *

DEPOSITION OF LEIGH PEGUES

* * * *

Q. Prior to your testimony before the committee, had you had any discussions with any legislators concerning this bill?

A. Yes.

Q. Would you tell me who you had had discussions with and when?

A. One time in Swift's office he called me down there, and there were some senators in the office. You probably could describe them as floor leaders, and they were talking strategy on the bill, and I was in the meeting.

Q. To the best of your recollection, Mr. Pegues, would you relate those discussions to me?

A. The discussions I had with it, I don't think they particularly asked me anything. I guess, again, I was therefore a reference person. What probably was asked of again about the six fifty. It was a typical floor leader strategy meeting, and I am not one of those.

Q. When did that meeting take place?

A. Somewhere within a week of it coming up—a week or ten days of it coming up in committee at F&T.

Q. So this would have been before your testimony at F&T?

A. That is correct.

Q. Was there any discussion in that meeting of the lowering, the possible lowering of tonnage at the site?

A. No.

Q. Was there any discussion in that meeting of the differential between in-state and out-of-state fees?

A. Yes.

Q. Tell me if you would to the best of your recollection what was said concerning the differential between in-state and out-of-state fees.

A. To the best of my recollection, the discussion was the strategy of the other side would be to make an all out attempt to make the differential larger so they could go in the court and fight it and give them a better opportunity.

Q. Do you recall what the differential was at the time these discussions were being made?

A. No.

Q. Was there any other discussion of the differential between in-state and out-of-state fees?

A. I don't know of any.

Q. Was there any discussion about lowering the amount of out-of-state waste coming into Alabama?

A. No, not to my knowledge.

Q. Was there any discussion during the Senate Finance and Taxation Committee of lowering the amount of out-of-state waste coming into Alabama by you or any of the senators while you were present?

A. You have got to be more specific on that. I don't understand. You know, we made the estimate of six fifty. What are you asking me?

Q. I am asking if during either your meeting in Robin Swift's office with the Senate floor leaders on in the Senate Finance and Taxation Committee when you testified if there was any discussion concerning the effect of the fees being to lower the amount of out-of-state waste?

A. Yes, I believe, and I think it was Senator Windom mentioned the tonnage would probably be, according to Waste Management, ninety to a hundred thousand tons, and I believe he voiced he hoped that happened. And he asked me, and I said, yes, I hope it does too. That was all.

* * *

DEPOSITION OF BERNARD WEBB

* * *

Q. Just to back up for a second, while you were working in the insurance industry, were you ever involved in any way the writing or the loss reserves or actuarial experiences with insurance for hazardous waste disposal?

A. No.

* * *

Q. And from your recollection, what is the current status of waste disposal technology and insurance for waste disposal facilities?

A. It is currently developing. Very little actually is known right now about the effectiveness of the technological things that are used right now in the process.

Q. All right, sir. What about insurance?

A. Insurance is for practical purposes almost unavailable. That is, the insurance that is available is very limited in terms of amount. Essentially one company in the United States is writing for waste disposal facilities like Emelle. There are several others that write pollution insurance for underground storage tanks for petroleum people and things of that kind. But as far as hazardous waste disposal site is concerned, one insurer writes somewhere in the neighborhood of a maximum of ten million dollars of coverage. I have obtained different figures from them at different times, but it is all in the vicinity of ten million dollars.

Q. What company is that?

A. That's the American International Group and their principal pollution insurance company in the past has been the National Union Fire Insurance Company. They have recently formed another company which I believe is AIG Pollution Insurance Company or words to that general effect which may be replacing National Union Fire, but I am not sure of that.

Q. You also indicated you had reviewed some insurance industry publication?

A. Yes, sir.

Q. What specific publications have you reviewed?

A. I have several publications on the assessments of pollution liability risks; The Availability of Pollution Liability Insurance, Claims Administration and Pollution Liability Insurance. I think there are three published by AIRAC, A-I-R-A-C, which is an acronym for All Industry Insurance Research Advisory Committee. There is one published by the American Insurance Association which is a trade association, and one published by an industry advisory committee to the National Association of Insurance Commissioners on the availability of pollution insurance, and one published by an organization in the United Kingdom called, Insurance and Reinsurance Research Group. Although it is published in the United Kingdom, it deals with the U.S. pollution insurance exposure.

Q. What did you determine from your review of the insurance industry publications in terms of what you felt was relevant to your task in this case?

A. That insurance is not available in amounts adequate for the risk and that there is no significant competition insofar as hazardous waste disposal facilities are concerned. In other words, one company in the market. It is also very expensive. What is available is very expensive, and it is frequently written on an indemnified basis where the insured enters into a side agreement to indemnify the insurance company for any claims they pay.

Q. If it is entered on that indemnified basis from your knowledge of the insurance industry, if the insured goes belly up, the insurance company is still going to be stuck with the coverage, are they not?

A. That's correct, except they frequently require some kind of security such as a letter of credit or something.

Q. But the insurance company would not be let off the hook just because the insured's indemnity wasn't as good as they thought it was to begin with?

A. That's right. The insurance company would have to take their chances on recouping.

* * * *

Q. What were you able to determine from the Chem Waste insurance policies that you felt were relevant to your task in this case?

A. The only thing that changed anything I already knew actually was the fact that they limit some of their—their gradual pollution coverage were higher than had been indicated in the other documents I reviewed. It was ten million per occurrence and ten million aggregate rather than the three and six that I had found in other documents.

* * * *

Q. How long did you meet with Mr. Wood and the other employees at Tom Joiner & Associates?

A. About two hours. I talked to Mr. Wood on the phone at various times too.

Q. What as best as you can recall, what was the discussion in the two-hour meeting that you had at Tom Joiner & Associates?

A. The various occurrences which might result in the migration of pollutants out of the Emelle facilities into other places and possible remediation cost.

Q. Can you be a little more specific about both of those categories?

A. Yes. And probably a little more general as well. We also discussed the potential for accidents while hazardous wastes are being transported to and in some cases from the Emelle facility. We talked about the possibility of contamination of the aquifer under the Selma chalk, the possibility of earthquake damage releasing pollutants, hazardous materials, the possibility of tornado damages to the tanks, particularly the surface tanks where PCB's and leachate are stored. We also talked about the possibility of sabotage or terrorist attack on the facility, or just simple carelessness on the part of employees or mechanical failure, or the acts of a possible disgruntled

employee who might potentially release hazardous waste into the environment, things of that general nature.

Q. Would it be fair to say that this was a brain storming session?

A. To a large degree that would be a fair characterization of it. We did get fairly specific. I asked them to give me estimates of remediation cost for three specific scenarios. One would be the possibility that a tank truck loaded with PCB's would go out of control and crash in say the Warrior River releasing its cargo into the river. Another one would be the possibility that I had already mentioned of a tornado striking the tanks and scattering PCB's around the area. And the third one was the contamination of the Eutaw aquifer.

Q. Did they come up with cost estimates?

A. A range of estimates. They indicated that the cost of remediation insofar as possible to remediate in the case of the truck in the Warrior River would be measured in the tens of millions of dollars; that is, it would be somewhere between ten million and ninety-nine million. Also it would not be possible to completely remediate that because it would wash on downstream, and there would be other nonfinancial losses along the way; loss of the use of the river for various purposes, loss of fisheries, and things of that nature.

In the case of the tornado striking the PCB tanks, they estimated that at somewhere between a hundred thirty-six million, which I believe they indicated was a figure developed by somebody at Chemical Waste Management, but I don't know the details on that, up to a maximum of one and nine-tenths billion, depending on how widespread—how widely the tornado spread the PCB's. And again it would not be possible to completely remediate the damage, so it might be additional losses in terms of PCB's washing into the rivers or soaking into the soil or some of those things.

Q. What about the third?

A. The pollution of the aquifer, they did not come up with figures. They said it was virtually incalculable. It would be measured in billions, but they were not able to come up with a precise figure, that it could be many billions. Again, you have the same situation where it might be a loss of the use of the aquifer or the water from the aquifer to the extent it could not be fully remediated.

Q. Was there anything else that was discussed at this brainstorming meeting or that you had discussed with Mr. Wood in phone calls subsequent to that?

A. We have discussed in fairly general terms the possibility of hazardous waste migrating through the Selma chalk and into the Eutaw structure.

Q. Can you elaborate on that?

A. Yes. We have discussed the possibility that there may be—already be fissures or cracks, whatever you want to call them, in the chalk that might permit the migration of hazardous materials or the possibility of that since fissures might result from earthquake activity there.

Q. Have you or to your knowledge has anyone with Mr. Joiner attempted to quantify that possibility?

A. To the best of my knowledge it has not been quantified, no.

Q. Have either of the other two scenarios, the tanker truck wrecking in the Warrior River or the tornado striking the storage tanks, have the possibility of those occurrences been quantified to your knowledge by either you or anyone at Tom Joiner & Associates?

A. I don't think they are precisely quantifiable. There have been a number of truck accidents involved. I have seen a list of them, a relatively small number as I recall, twenty or so. I am not sure of the exact number right now. None of them went into the Warrior River, but it is a possibility. There have been six reported tornadoes in Sumter County between 1950 and 1989, so the probability—actually the probability of either of those happening is relatively small. It is just not something I

would anticipate happening once a year or anything like that. But they could happen. There is no way really to calculate the probability of a tornado hitting a specific small area.

* * *

Q. Have you reached any opinions or conclusions regarding this particular case?

A. Yes. I have reached a conclusion that the State of Alabama has a very substantial financial exposure to possible losses arising out of the operation of the Emelle facility and that those financial losses could be into the billions of dollars.

Q. All right, sir. On what do you base your opinion first that the State has substantial financial exposure, and then later we will get into how you get to the amount of it?

A. All right. The State appears to be the pocket of last resort you might say. After everything else is exhausted, the State will probably be required to put up the money to correct any general pollution resulting from—when I say general, I mean in terms of area—resulting from the operation of the Emelle facility. Also the State will at the very minimum have the residual responsibility thirty years after the facility is closed and quite possibly before if Chemical Waste Management should become insolvent. The State of course also has other exposures besides the financial exposure in terms of the quality of life to the people of Alabama and things of that nature in the event of serious pollution arising from the facility. But the financial exposure alone could well be into the billions.

Q. Let me see. Are these really the bases of your opinion that the State has substantial financial exposure, the pocket of last resort and that it may have residual responsibilities after the facility is closed?

A. That plus the fact that I understand the State holds title to the hazardous waste that were put into the facility prior to 1985 which might give them a more immediate liability.

Q. All right, sir. In what ways, if any, do the various list of, if I can call them the list of horrors, the horrible things that can happen, how do those factor into your opinion and conclusion if at all?

A. They factor in in terms of trying to put a maximum on the State's exposure. Unsuccessful in that attempt, because we are unable to quantify the worst one of all, but trying to see what the potential exposures were given some very serious scenarios.

Q. And in coming up with the figure of a billions of dollars, is that based upon your discussions with the folks at Tom Joiner & Associates?

A. Yes. That's their evaluation or statement of potential.

* * *

Q. Have you in any way attempted to differentiate in your conclusions between waste that is generated within the State of Alabama and waste that comes from outside the State of Alabama?

A. No.

* * *

Q. And in your scenario number one where you had the tank truck with PCB's going into the Warrior River or you and Tom Joiner & Associates came up with a cost of remediation of ten to ninety-nine million dollars, that might well be the same if that tanker truck was loaded with some chemical product and it ran off the bridge into the Warrior River; isn't that true?

A. Depending on the chemical, it could be, yes.

* * *

Q. Mr. Webb, in going back to the three scenarios that you testified to, the first scenario is about the tank truck that crashes into the river. In terms of either the relative probability of that occurring or the cost of remediation it is not going to matter from your standpoint whether that tanker truck comes from Georgia or Alabama, is it?

A. No, not at all.

Q. And the same is true concerning the tornado striking the PCB tanks? It doesn't matter from your analysis whether those PCB's came from Georgia or Alabama initially?

A. That's correct.

Q. And finally on the last scenario of horrors that you came up with, the contamination of the Eutaw aquifer, that also does not differ based upon whether the contaminant that gets into the Eutaw aquifer originally came from Alabama or Georgia or some other state; is that correct?

A. That's correct.

* * *

Q. Now, your opinion that the State has substantial financial exposure ultimately—I think the words you used were the State is the pocket of last resort; is that correct?

A. Yes, that's correct.

Q. Would it matter in your opinion or conclusion what earlier pockets were available?

A. Yes. If the earlier pockets had sufficient resources to absorb any potential loss, then the State would have less risk.

Q. Now, I believe you indicated your general understanding of CERCLA or Superfund is that in some circumstances generators of waste may be held liable for cleanups; is that correct?

A. That's correct.

Q. Have you attempted to determine the list or a listing or a review of the generators that have sent waste to Chemical Waste Management?

A. No.

Q. Would that have an impact on your conclusion; that is, if some of these generators in fact had pretty deep pockets?

A. Depending on the extent of their contribution to the problems it might, but it is my understanding there are a large number of generators who have waste stored at Emelle. And that of course reduces the possibility of

recovering from anybody because it almost certainly would be surrounded with long and lengthy—long and involved litigation before anybody paid anything.

* * *

Q. Mr. Webb, we were about to break, and then it appears that perhaps I have not yet elicited all of your opinions or conclusions. Have you reached any other opinions or conclusions other than the ones you have testified to earlier today?

A. Yes. There is one. I was asked what amount of insurance I would recommend the State of Alabama buy if such insurance were available. I concluded that I would recommend limits of one billion dollars.

Q. Limits of one billion?

A. Yes.

Q. How did you arrive at that figure?

A. From reviewing the scenarios that we discussed earlier and other information regarding the cost of remediation at various Superfund sites.

Q. Have you attempted to determine whether that insurance might be available?

A. It is not available.

Q. So I take it you have determined that, and it is not available?

A. That's correct.

* * *

Q. If I ask you, Mr. Webb, to assume as a hypothetical that one of the pockets of earlier resort as we have been using the term concerning the Emelle facility is the United States of America, would that have any impact on your conclusion?

A. I think they are a reliable pocket, and therefore if they were fully responsible for it, the State would have a very small financial exposure. They may still have the exposure for quality of life and things of that kind, but their financial exposure would be very small.

Q. It certainly wouldn't be anything like the one billion dollars—again, assuming my hypothetical, it wouldn't

be anything like the one billion dollars that you testified to?

A. That's correct. In that hypothetical situation, the State would not need that much protection.

* * *

Q. Professor Webb, you were asked a question a few moments ago about insurance at which time you opined that the State of Alabama should have an insurance policy in the one billion dollar range if such a policy were available. Do you recall that testimony?

A. Yes, I do.

Q. Do you have an opinion of the amount of the insurance premium for such a policy assuming such a policy were available?

A. If the insurance were available, I would estimate that the premium for it would be in the range of a hundred to a hundred fifty million dollars a year.

Q. How did you arrive at that estimate?

A. From looking at what is charged for what is available and general knowledge of how the insurance industry operates and how that might translate into a premium for a larger policy.

Q. You were asked questions by Mr. Wells about whether you had previously performed risk management services in the hazardous waste industry. Do you remember those questions?

A. Yes, I do.

Q. Based upon your experience as a risk manager, is it necessary for a risk manager in the insurance industry to be an expert in hazardous waste industry in order to reach the conclusions that you testified about today?

A. No, it is not necessary, because the principles of risk management that apply to hazardous waste management apply to other areas. It is simply the technical details that differ. So the risk manager who understands the principles of risk management would then rely on experts in waste management for the technical detail.

* * *

Q. In response to questions by Mr. Wells concerning the 10-K form of Chem Waste, as I recall you mentioned that approximately thirty percent of the net worth was shown to be goodwill and that thirty-six percent of the net worth was reflected in their 10-K as land purchased at cost. Do you recall that testimony?

A. Yes, I do.

Q. What is the significance of those percentages to you insofar as analyzing Chem Waste's overall situation?

A. Those have no market value in a bankruptcy situation was the thought behind it so that in the case of a bankruptcy situation the available net worth to meet Chemical Waste Management's obligations would be reduced by at least two-thirds, quite possibly more but at least two-thirds.

* * *

Q. So your opinion with respect to the liability the State has as a result of Emelle would be based upon the hazards only at Emelle; is that correct?

A. That's correct.

Q. And the fact that there are risks other places does not diminish the risk at Emelle?

A. That's correct.

Q. You referred to some resource books that you looked at concerning earthquakes in Sumter County?

A. Yes.

Q. Are these generally recognized as authoritative sources that you were referring to?

A. Yes, they are.

Q. And how many earthquakes do they reflect had occurred in Sumter County?

A. Only one of them mentioned earthquakes in Sumter County, and it mentioned two.

Q. Were those both in the 1986 time frame?

A. February of 1886. They were on February 4 and February 13, 1886.

Q. Excuse me. I did of course mean 1886. Are you aware of any reports that the earthquakes actually caused the ground to move up and down by a foot?

A. Yes. There was a report in the Sumter County newspaper that indicated that the ground at Moscow rose a foot and then returned to its original position. There was a report—the report in the Mobile paper indicated that it rose a half a foot, so I don't know which one of those is correct.

* * *

Q. Mr. Webb, Are you aware of any studies subsequent to the 1886 earthquake that in any way indicate that that earthquake compromised the integrity of the Selma chalk?

A. No, sir.

* * *

DEPOSITION OF RODGER HENSON

* * *

A. My understanding is that nobody knows how long a synthetic liner will last. And I have always maintained since the outset of synthetic liners that synthetic liners are not the thing that will stop hazardous waste migration in the Selma chalk.

It is the Selma chalk itself, which is infinitely better than any synthetic liner could ever be. So I don't know how long a synthetic liner would last.

I do know that the Selma chalk has been there for 100,000,000 years, and probably will be there for at least that much longer.

* * *

Q. What is your understanding of the length of time, currently, of the post-closure period?

A. My understanding is that it is 30 years after closure.

Q. Yes, sir.

A. My understanding may be wrong.

Q. But in other words, there is a period, which I believe is 30 years is what I have been hearing.

A. There is a period after closure of any hazardous waste facility, that is called the post-closure period.

Q. For which a company has the responsibility as mandated by EPA to be involved with the monitoring or general liability for the landfill facility?

A. That is correct.

Q. But presently, there is no law or regulation in place mandating such monitoring or control or liability of the operator or owner of the landfill facility post-closure, longer than thirty years?

A. Thirty years is the number that I am familiar with.

Q. All right. And let me ask you this: Are you aware of any funding by ChemWaste or its parent company of

post-closure responsibilities or possible liabilities for longer than 30 years?

A. No.

A. I would say that the facility should last at least 100 years at current rates.

Q. Capacity?

A. Maybe more.

Q. Yes, sir. This is the largest, certainly the largest landfill hazardous waste burial or storage facility in the United States at the present time, isn't it, at Emelle?

A. Yes, it is.

Q. Now with the Fee Bill enacted, and increased fees, I understand that the hazardous waste has decreased? You have covered that?

A. Yes, sir.

Q. What is the effect of that decrease upon the out-of-state current generators? What are their options now?

A. Their options are to take it somewhere else.

Q. Where it is cheaper?

A. Where the tax is less.

Q. Yes. Do they have an option also to operate their facility so as to reduce the amount of hazardous waste generated?

A. They can do that, but I suspect that is not what is happening now, because it takes time to develop those waste reductions.

Q. The waste—

A. The waste minimization programs don't happen overnight.

There is probably some of that going on.

Q. As a result of the increased fees?

A. Yes.

There is water and it is waste at Emelle, created by rainfall.

Q. And in addition, there is leachate?

A. In addition, there is leachate.

Q. What was the cost in 1989, the approximate cost of the pumping, gathering, collection, and transportation, storage and transportation, of the ground water, waste water, or leachate as we have discussed earlier, from the Emelle facility?

A. Ten to fifteen million gallons at twenty cents a gallon.

Q. So we are talking about a total cost of approximately two million to three million dollars a year?

A. Yes.

Q. Now as I understand it, there are also monitoring costs with respect to the Emelle operation?

A. Yes.

Q. What was the extent of the approximate amounts of the monitoring costs that have been incurred with that in 1989?

A. Oh, let's say 50 samples a quarter, and those analyses will run from \$100 to \$300 per.

Q. Were there any other monitoring costs?

A. Not that I can think of.

Q. Do you have any personnel who are engaged full time at Emelle with respect to monitoring activities?

A. Yes. There is a crew of four chemists and technicians who do that.

Q. So would what be a—?

A. So technically speaking, their time, at least part of their time should be allotted to the monitoring costs. They do other things as well.

Q. What proportion?

A. Half of their time.

Q. And the facility, there is some proportion of the cost of operation of whatever laboratory it is they use; or is that included in the sampling cost?

A. The laboratory that is used is offsite.

Q. So all totaled, thinking about those items, and the payment of the offsite laboratory facilities, and appro-

priate 50 percent or whatever portion of the chemists, the four chemists' salaries and fringe benefits, et cetera, the various samples; approximately what type of costs were you speaking of in 1989?

A. Well, I don't have my calculator with me.

Q. May I give you a sheet of paper.

A. I said 50 times 4; that is about 200 samples. That is an approximation. That is based on the number of wells and how often we have to sample them. So if it costs \$100 a sample, that would be \$20,000. If it cost \$300 a sample, that would be \$60,000. Chemists time, half the chemists time; let see. If you paid him—half the chemists time would be probably another \$50,000. So that is \$110,000. I'd say \$100,000 to \$150,000.

* * *

DEPOSITION OF JOHN HANLEY (PART 1)

* * *

Q. Explain to me again—I have got away from this, and I am little vague on it now, but would you explain to me the factors as to pricing with respect to location?

A. Location, there are only in reality, even though there is some 30-odd landfills in the United States, about half of those have some kind of permitting problem or some small nature of problem, so they're not really viable. That leaves some 15. Out of the other 15, I think there are only probably eight to ten today in the entire United States, that can receive all the waste that is generated that is going to landfill.

So you basically have eight to ten landfills serving some 50 states.

* * *

Q. What amount of cleanup would you say, what percentage of your 1989 tonnage, came from cleanup operations as you have just described, as opposed to currently generated waste? And I'm speaking of Emelle.

A. 70 to 90 percent.

* * *

Q. It is also the opinion of industry that the hazardous waste treatment and disposal industry that the amount of hazardous waste being generated itself will certainly decrease?

A. Absolutely.

Q. Why is that?

A. There is more technology. There is better technology. There is more pressure on the industry. Ninety-five percent of all hazardous waste generated today is either recycled, detoxified, neutralized, incinerated within the facility of a process of which it is generated. Only five percent of the material ever leaves the facility to go outside to a commercial facility.

* * *

Q. So roughly non-hazardous waste, non-PCB waste, just regular solid waste, would be about 25 percent in 1989?

A. Non-hazardous was 25 percent, PCB's were 25. RCRA waste was approximately 50, I believe.

* * *

A. Do you want to know how many trucks come into the facility each year?

Q. (BY MR. NETTLES) Yes, in 1989.

A. 40,000—she is correct, that is close enough.

Q. So we are talking about approximately 40,000 truck loads coming into Emelle during 1989?

A. All right.

Q. On the basis of allocating the approximately 800,000 tons of waste landfilled there, and dividing that by the 20—approximately 20 tons per truck?

A. Correct.

* * *

A. We ship aqueous waste water to Texas, to Corpus Christi. That is rainwater.

Q. Describe how that is developed or what that comes from?

A. Any rainwater that hits on any active area, any tank or roofs inside the cell, we collect and pump it all to one tank farm, a six million gallon tank farm.

And then as the rain accumulates, or the water accumulates, we ship it by truck to Corpus Christi, Texas, for disposal.

Q. Is that a ChemWaste facility in Corpus Christi?

A. Yes, sir.

Q. Approximately how many truck loads would you ship out per month, of the aqueous waste water, or rainwater?

A. We haven't shipped any in two months.

Q. Per year? What would you have handled in 1989?

A. We generally accumulate somewhere between—I think the low point was nine million, and somewhere between nine and fourteen million gallons a year of water that we collect.

* * *

Q. In other words, this 200,000, approximately 200,000 tons of industrial waste, disposed of at Emelle last year, was industrial waste as distinguished from garbage or trees or things such as that?

A. Yes. That could have been disposed in those other landfills. In a nonregulated landfill.

Q. At that time?

A. Yes, sir.

Q. But because of the potential liability of the—

A. Of future regulation changes, they choose to come to Emelle.

Now, the back side to that is these new wastes, even though now they are hazardous by characteristic, we can treat them, take away the characteristic, and we can send them to a solid waste landfill or what you call a garbage landfill.

We can do that next week or the next or the next. Once you remove the characteristics and it's nonhazardous forever, then you can go ahead and put it in a subtitle D landfill. And that's probably what most generators are going to do.

Q. Assuming there is not some drastic current change in regulations on down the line, not presently—

A. This will clear it. This will totally clear it, because it's toxic only by characteristic, not by the definition of hazardous, so you remove the characteristic, it no longer is a hazardous waste for ever more.

Q. Explain to us the other side of the coin. What hazardous waste is there that remains hazardous even though it may be treated?

A. Once hazardous, always hazardous. That's by EPA definition. It's because the metals—that's by the chemi-

cal content of the waste. Once hazardous, it's always hazardous. You cannot ever remove the code.

* * *

Q. I ask you to look at page 24 of the report. With respect to a strategy for addressing long-term post-closure concerns, are you aware of whether or not EPA has developed a strategic plan for addressing that issue as described in the first two paragraphs there?

A. Well, aside from that, I know that we basically are responsible for some thirty years. At the same time, we also know and recognize and accept that if EPA changes the regulations and extends that period or requires us to do something other than what is currently specified, then we have to comply with that by law and by the regulations.

And I firmly believe that our company is prepared to do that financially and in any other effort that is required. They can change the thirty years to sixty years if EPA so chooses, and we would still have to comply.

Q. I ask you to look at page 26 in conjunction with your last testimony. I think this ties in. Look at the last sentence of the paragraph there on 26 of this GAO report, Exhibit 14.

"It is generally assumed that the post-closure maintenance and monitoring period will be longer than thirty years but EPA currently does not have firm plans for extending the post-closure care period at hazardous waste facilities."

Now, I gather that sentence, at least, jives with your understanding that the present post-closure maintenance and monitoring period is no longer the thirty years?

A. Currently, it is thirty years, but we recognize that they may change that. It was some eight or ten years ago when that was made and wherever they change and wherever they move the regs, we know that we have to go with that.

It's not a secret that EPA is under some criticism from more than one source, i.e., the super fund and the

management of it and how they've done it, how they've handled their money, and that's obvious, that's in the press today.

You know, you have to pick and choose your own news articles. But, yes, I believe the company believes that it will be extended beyond the thirty years.

Q. What funds, if any, are presently being set aside to fund the post-closure maintenance and monitoring and general liabilities that may occur beyond thirty years?

A. I cannot answer that. That part of the interrogatories was prepared by one of our attorneys. And I chose not to read it before I came. Prior to that I did not know exactly where the moneys were. I've never asked the question before.

* * *

Q. What is the purpose of the monitoring?

A. To insure that there is no migration.

Q. By migration, do you mean leakage?

A. Well, if you want to call it leakage, yes.

Q. Is that just another similar synonymous term?

A. We don't use leakage, because we don't have any. We use migration. But that's for tracking. In setting a background over a period of years to go ahead and test, the main thing that you need to do in our industry as far as monitoring is to insure that you have a great understanding of the background information.

Q. In 1989 approximately what was the cost to Chem-Waste with respect to the Emelle facility in providing the company-handled or paid monitoring services that you have described?

A. Internalized I think it's four or five—five people that—it's in excess of a million dollars a year.

Q. That would include your internal employees plus your outside consultants?

A. Yes, sir. Depends on how far you want the program to go. If you want to cover any MPDS, which is the point discharge, it has going to be tested for a water

sample and all that stuff, it could be even higher than that, because I think that consultant fee that set up was over a half a million dollars.

Q. So you're talking about over a million plus additionally—

A. Yes, it could be additions to that.

Q. —another half a million?

A. Right.

Q. I'm trying to get a handle, like on the trucks while ago, of the total cost internally or externally paid on an annual basis taking last year—

A. I would be comfortable in saying it's well over a million dollars. The numbers I can always get. I don't try to remember it but I know it's in excess of a million dollars a year.

Q. I gather probably in excess of a million and one half?

A. Yes, sir, I believe it is.

* * *

Q. Okay. Would you agree that the higher the fee or tax imposed by the state the less hazardous waste would be sent into Alabama for disposal?

A. I wouldn't agree—I don't agree with it, but it's certainly effective in making it here that way since the tax was effected. It appears to us at this time, which is only about four or five weeks, that it has reduced our volume of business and whether portions of it are attributable to the tax or they changed the regulations, I don't know at this time. But I'm sure it has had an effect on it, yes.

Q. But you don't know the extent of that effect?

A. We don't know that yet. I think the worse month or the month that can really, will tell us how significant it is will be in October.

Q. In October?

A. I think October will be the true reflection with a significance on how significant it has been.

Q. What about September? How are the receipts running at this time?

A. About 50 percent, 40 to 50 percent of normal.

Q. Of what they were last September or what they—

A. Roughly, yes.

* * *

Q. (BY MR. NETTLES) With respect to volumes, increases and decreases in volumes of hazardous wastes received at the Emelle facility in August thus far and September, have you noticed any increase or decrease with respect to in-state generating of hazardous waste?

A. No, none. I don't notice that that has affected in-state very much at all.

Q. Okay.

A. But it's not—in-state has never been a large contributor anyway.

* * *

A. The most we've ever handled—most we've ever handled was about three fifty.

Q. Three hundred and fifty trucks in a day?

A. Yes, sir.

Q. What's the average?

A. The average, you know, I really can't tell you. We gave you how many loads or how many tons we did in a year. But there is no average it can be. Like right now, it's only twenty-two—twenty-three for everything all day. You know, on other days it could be around sixty or seventy.

* * *

DEPOSITION OF JOHN HANLEY (PART 2)

* * *

But basically this trench here is on automatic pumping system. And it goes underground up to this tank. In addition to that, the water that is caught through the truck wash every time we wash a vehicle, that water is captured and also goes to the tank farm.

And these buildings, which is the seven hundred and the seven oh two, anything that is contained in ramps or concrete or any of the rainfall that hits on these, it's also captured and pumped underground up to—I'm sorry—up to the tank farm.

Any active area that collects any type of liquid waste from rain or from anything at all goes to this tank farm, and that's where we store it and that's a six million gallon tank farm.

* * *

Q. So is it not correct that to that extent, to the extent of the aqueous waste water, and particularly the leachate or waste water that is pumped out of trench twenty-one, you have ChemWaste actually being a waste or hazardous waste generator?

A. That is correct.

* * *

Q. And so would you say that then permanent destruction of hazardous waste is not achieved through burial or disposal at Emelle?

A. Permanent destruction?

Q. Yes.

A. There is only one way known today to have permanent destruction, and it's still not permanent destruction for the entire amount of volume that's created, and that is incineration. And you still have the residues and ashes and the same thing and the same waste codes are still there and they never go away by definition of the strictest interpretation.

* * *

A. * * * But Alabama only generates sixty-eight, sixty-nine thousand tons a year.

* * *

Q. As I understand it from ADEM docket number OA50 there were some eleven spills at the Chemwaste facility at Emelle in 1989? At or involved with the Emelle facility?

A. That's possible. Keeping in mind that a spill could be less than a pint.

* * *

Q. Now the records we have indicate there were only two spills in 1988, one in 1987, two in 1986, two in 1985 and one each in 1984 and 1983?

A. Okay.

Q. Assuming the accuracy of that and assuming that there were in fact eleven spills in 1989, do you have any opinion as to the reason for the increase in spills in 1989?

A. Two reasons. Number one, there was a greater awareness on our part internally from our policies and procedures of reporting everything. It's just like in accidents and incidents or anything else, we have an incident review board that meets every Friday morning, that covers every incident you can think of that may have occurred on that site, whether safety, environmental or whatever. And we review these each week.

What may not have been reportable in '83, '84, '85, '86 now is certainly reportable within the site policies and procedures. And then those that are currently reportable by quantity to ADEM or EPA.

Certainly there is a greater awareness of that also. And I think those two reasons is the reason that you may see a significant increase in those reportable quantities. Many of the reportables in 1989 primarily should have been charged to some of the transporters, not Chemical Waste at that facility because we were doing the reports and signing them.

This year we've made a different procedure. If a transporter brings it in and it's leaking, it belongs to him. He must report it himself.

Q. This part of the year so far, how many spills reportable or attributable to Emelle, to the ChemWaste operation of Emelle, how many to your knowledge have you required to be reported by the transporter?

A. I don't want to venture off the top of my head. I know the number of spills that we have had.

Q. How many?

A. Relatively small, three or four I think.

* * *

A. * * * All of the geologic studies that we do and all of the information that we receive—you've got to understand these—it's only been ten years since this whole industry started.

People are continuing to learn about leachate and water pressures and secondaries. They don't even know how to estimate this. Nobody does. So there are studies ongoing every day all across the United States, not only at ChemWaste, about how all of those things function.

And as things change, as the regulations change, as our information from our own consultants becomes better or over a longer period, then we all have to listen to that and do what we think is best. But there is not a definitive answer.

If there is a definitive answer, it needs to come from an expert consultant. But we are very flexible with that and we continue to study those numbers.

Q. And as you said the technology is constantly improving?

A. Absolutely.

* * *

Q. Is it your testimony then that in your opinion Emelle is a safe site because of the fact that ADEM and EPA are monitoring it and that they are requiring that whoever operates it operate it in accordance with their existing regulations?

A. That's a portion of it, yes.

Q. But you do recognize that the state of art is always changing with respect to the hazardous waste industry?

A. The state what?

Q. The state of the art is always changing with respect to the hazardous waste industry?

A. Yes, sir.

Q. That all the environmental risks may be imperfectly known at this time?

A. That's a possibility.

Q. Now, you said that you have had a reduction in the amount of waste brought to Emelle in the past month or so since the fee act became law?

A. Right.

Q. The effect of that is, would you agree, to cause the generators of waste to seek other means of either disposing of waste or means of minimizing the waste that they generate?

A. I've stated once before that ten percent of what we call generators or owners contribute ninety to ninety-two percent of all the waste that comes to our facility.

Those are clean-up projects. These are wastes and contaminated soils that have been generated over the last fifty or sixty years before there was any recognition that the environment was being contaminated or lands were being contaminated.

The generators of today in the last five years have done a heck of a job in minimizing their waste. Only five percent of all the waste generated in the United States ever leaves the facility in which it is generated.

The other ninety-five percent is recycled, neutralized, detoxified, or whatever. It's the clean-up from fifty years that generates the mass volumes of waste.

* * *

DEPOSITION OF WILLIAM BRUMUND

* * *

Q. So am I correct in saying that the Love Canal and the problems resulting from the Love Canal cleanup in the mid and late 1970's really was sort of a catalyst for the development of what we now look upon as hazardous waste technology and regulations?

A. It certainly focused the nation's awareness on a particular set of problems which probably had not been addressed directly before.

* * *

Q. In your opinion, would you think—Based upon your expertise, your education, your background, and knowing generally, I assume, the topography of North Carolina, in your opinion would there somewhere within the state of North Carolina be a site that would be appropriate—meet the various regulations and design for government and design standards necessary for the investment a commercial hazardous waste landfill?

A. I think that from an engineering standpoint, you can engineer a facility to meet the regulations for a hazardous waste facility in North Carolina.

Q. Would that be true of most of the states in the United States?

A. I think so.

Q. Can you think of any states generally that it would not be true of?

A. When you say meets the regulations, probably not, but I think there are some states which are not well suited to the disposal of hazardous waste because I fundamentally believe in geologic containment as opposed to engineer containment.

Florida, which is a sandbox, has high groundwater table, and water is a precious commodity down there. Saline-free water is a more vulnerable area from the standpoint of locating hazardous waste facilities.

Q. How about North or Northwest Florida?

A. It starts to get better, but there's a lot of Florida that isn't that way.

Q. But do I understand you correctly that in your opinion that aside from the engineering aspects from the natural sites that would be available, that generally in every state of the United States, there would be a suitable landfill site available for the disposal of hazardous waste in the landfill operation?

A. Well, I'm uncomfortable trying to generalize like that, I think that, as I said, given a site somewhere in a state, a design can be developed to meet the current standards. Whether or not it's as good as sites in other states, we have to look at the specifics of each.

Q. Do you think there are sites available in other states as good as the one at Emelle for the disposal, burial, storage of hazardous waste landfill?

A. Well, of the sites I've seen in the United States and elsewhere in the world, I think Emelle has many desirable features. It has a lot going for it. In my opinion, it's one of the best geologic sites I've ever seen.

* * *

Q. Is it not correct that hazardous waste and the storage of hazardous waste generally presents a greater environmental risk or problem on the one hand than the disposal landfill of solid waste on the other?

A. I'd say so, yes, sir.

Q. Solid waste landfills by definition do not accept hazardous waste for disposal?

A. They're not supposed to.

* * *

Q. All right. Is chalk a natural—a good natural source of groundwater?

A. No.

Q. Why?

A. Because it's relatively impermissible. The chalk at this site is tighter than Dick's hat band.

* * *

Q. What is leachate?

A. It's the liquid that exists in a trench within the catchment area in which hazardous wastes are placed.

Q. What type of liquid?

A. Well, rainwater if it falls within the catchment area of anything where hazardous waste is placed. It's defined regulatorily as leachate.

* * *

A. Those early trenches were shallow and unlined. I do not know—As I said before, I haven't seen this drawing before I came in here just a few minutes ago.

Q. I understand. But at the same time, I need to know what you do know. If you don't know something, that's fine. But for obvious reasons we want to be as thorough as we can. If you don't know something, just tell us, and we'll go on—we'll just ask you impressions or go on to another area.

But let's go back. Is it your testimony that you do not know whether there's been any migration of groundwater or liquids from Trench 6 to Trench 7?

A. I do not know if there's been any migration from Trench 6 to Trench 7.

Q. Has there been, so far as you know, any hydraulic connection between those two trenches, 6 and 7?

A. As I mentioned, all of those earlier trenches were unlined, and they're fairly shallow and fairly near the ground surface. It would not surprise me therefore if there was an inner connection.

Q. How would that—why do you say that, that it would not surprise you if there had been some migration?

A. Because I talked to you earlier about the fact that the upper portion of the Selma chalk in places, exhibits staining along the discontinuities.

Q. That's the top one hundred and sixty feet?

A. Yeah. These trenches are all fairly shallow, as I recall, probably less than thirty feet deep. And they were not excavated, I don't believe, very deep below

ground surface; so there probably is some inner connection between those trench walls. They're in close proximity with one another.

Q. Would that likewise—If that were the case, would there not be the possibility of migration, hydraulic migration, outside the trenches going to the north?

A. Well, it depends—This suggests that there is a modest gradient in the chalk to the north.

Q. So what would be the answer to the question?

A. Fluid could move along these near surface defects in the downgrading direction.

Q. Is it your opinion that liners would retard the fluid migration?

A. In a short term.

Q. What are you speaking of in a short term?

A. Until the liner no longer serves—no longer is an intact and relatively and permeable membrane.

Q. What period of time would that involve in your opinion?

A. It depends on the leachate. It depends on the nature of things. It's probably in terms of tens of years, not thousands of years.

* * *

Q. Now, you mentioned your opinion or you made a statement with respect to there being a travel time of ten thousand years. What do you mean by that, sir?

A. I think it's explained in that report. It has to do with the time it would take a drop of water leaving the bottom of a trench at Emelle to make its way to the top of the Eutaw aquifer.

Q. And is it not correct that you and Golder Associates estimated that it would take ten thousand years for fluid to migrate from the Emelle facility down into the Eutaw aquifer?

A. I think we are just saying the same thing. I mean I thought that's what I just said.

* * *

Q. What, if any, estimates have been made that you might recall with respect to travel time, through the lateral travel time through the Selma chalk?

A. My recollection is that the lateral flow estimates to surficial waters like Bodka Creek and elsewhere or in the same order of magnitude as the flow to the Eutaw largely because the gradient is so low.

* * *

Q. In your opinion at the present time, are there adequate monitoring wells measuring lateral movement, if any, at the Emelle facility of fluid or hydro-geological movement?

A. I believe there are yes, sir.

* * *

A. Those cells which are unlined below the water table, they will be leachate because of insufficient rain fall during operation. This will take a while for that to be pumped out. After a cover is put on, you're going to have infiltration from the surrounding water table. So you are going to get seepage. You're going to get inflow which can be pumped out. It's really groundwater which flows into the trench.

Q. And it becomes contaminated?

A. During this whole process, everything is coming in, nothing is going out. So leachate will be generated because of close flow into the facility. And that's going to happen in all these facilities. Now, there were different things in the lineament themselves, but the situation basically is during operation and during the closure period. And flow will be into the facility.

Q. Well, would there be—I assume that the cells are closed or capped off. Would there continue to be generation of some leachate?

A. The movement—I assume you're talking about—Leachate means water. There will be inflow groundwater. So yes, there will be liquid in the trenches.

Q. Which is preferable in your opinion?

A. When it's removed, you always have the inward grading. So that eliminates the problem of exfiltration. If in the future you choose not to pump it and the gradient surrounds the chalk, then you will have a downward grading from the trench or some of the surrounding chalk. As soon as the water level in the trenches is in excess of a hundred and forty, there's going to be a downward grading of seepage, low pressure, depending on the slope of the groundwater moving away from the facility. The gradient at this site are very slow, very small. So you have to look at the slope, the groundwater table, the head in the Eutaw. You have to pay attention of which flow in and what direction at what point in time.

Q. In your opinion, would it be advisable from an environmental standpoint after closure to continue to remove leachate from the trenches?

A. I think that's more a matter of public policy. I think this site will be contained and will be diminimous downward and the trench equilibrate. If public policy suggests it, it should be. If you're going to have inward seepage, you would reduce the tendency for any.

Q. Again just in simple terms, do you have an opinion as to whether it would be preferable to continue the removal of leachate after closure?

A. If one wishes to continue to have a belt/suspender operation, pumping leachate provides an additional measure of protection.

Q. I must ask you, what do you mean by belt/suspender operation?

A. This is not a term that's used in Alabama?

Q. It's one I haven't heard of before. Possibly all the rest of the people have.

A. If you're interested in not having your britches fall down around your ankle, you can put a belt on. You can wear suspenders. It provides additional protection from having your trousers falling down.

We're interested in keeping the environmental trousers from dropping down. If you're not comfortable with your

belt, so you're going to wear suspenders; elements of protection. Provide an additional element of protection against exfiltration.

* * *

Q. So as far as you know, has ChemWaste, your company ever collected any surface water samples from Bodka creek or flowing well south of Bodka creek north of the facility?

A. I believe they have.

Q. Do you know whether anything, any contamination has ever been detected in those samples?

A. I do not believe it has.

Q. One more question on leachate. Will leachate continue to form or leak from a closed cell?

A. Is that a generic question or at this site?

Q. At this site.

Q. Will leachate continue to be generated at this site?

Q. Yes, sir.

A. Yes. Because those trenches are below groundwater level, you will have some either in equilibration or flow.

* * *

Q. You spoke a while ago of cleaning up contaminated water around the Selma chaulk. What would you recommend or think to be the most appropriate method on cleaning up any contamination? We spoke earlier of cleaning up contaminated groundwater. That may at some future time get into the aquifer. Do you have any opinion as to the best method or methods of cleaning up any contamination that may get into the Selma chalk or would that even be appropriate to undertake remedial action efforts at that point?

A. I think it would depend on how close to the surface it is. If it's real close to the surface, it maybe difficult. If you can regress it further, it might.

* * *

MAR 10 1992

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC., PETITIONER

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA;
ALABAMA DEPARTMENT OF REVENUE; AND JAMES
M. SIZEMORE, JR., COMMISSIONER OF THE ALABAMA
DEPARTMENT OF REVENUE, RESPONDENTS

**On Writ of Certiorari to the
Supreme Court of Alabama**

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether an Alabama waste disposal tax that applies only to waste generated outside of Alabama violates the Commerce Clause.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Chemical Waste Management, Inc. states that its parent corporation is Waste Management, Inc. Chemical Waste Management, Inc.'s subsidiaries (other than wholly owned subsidiaries) are The Brand Companies, Inc. and Cemtech Management, Inc.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-471

CHEMICAL WASTE MANAGEMENT, INC., PETITIONER

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA;
ALABAMA DEPARTMENT OF REVENUE; AND JAMES
M. SIZEMORE, JR., COMMISSIONER OF THE ALABAMA
DEPARTMENT OF REVENUE, RESPONDENTS

On Writ of Certiorari to the
Supreme Court of Alabama

BRIEF FOR THE PETITIONER**OPINIONS BELOW**

The opinion of the Supreme Court of Alabama (Pet. App. 1a-49a) is reported at 584 So. 2d 1367. The opinion of the Circuit Court of Montgomery County (Pet. App. 50a-96a) is unreported.

JURISDICTION

The judgments of the Supreme Court of Alabama were entered on July 11, 1991. Pet. App. 97a-101a. The petition for a writ of certiorari was filed on September 20, 1991, and was granted on January 27, 1992. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

Alabama Act No. 90-326 is reprinted in its entirety at Pet. App. 102a-114a. The challenged provision of Act No. 90-326, which is codified at Ala. Code § 22-30B-2(b), provides:

For waste and substances which are generated outside of Alabama and disposed of at a commercial site for the disposal of hazardous waste or hazardous substances in Alabama, an additional fee shall be levied at the rate of \$72.00 per ton.

STATEMENT

Petitioner Chemical Waste Management, Inc. ("CWM"), operates a commercial hazardous waste disposal facility located near the town of Emelle, Alabama ("the Emelle facility"), that is authorized to treat and dispose of hazardous waste under both federal and state law.¹ Most of the waste disposed of at the Emelle facility is generated in other states and moves in interstate commerce to Alabama for treatment and/or disposal.

For several years, the State of Alabama has been trying to prevent the Emelle facility from receiving and disposing of hazardous waste generated in other states. Alabama's efforts repeatedly have been rebuffed by the courts—until now. The State's latest assault on non-Alabama waste is a \$72 per ton dis-

¹ Generally, the term "hazardous waste" includes wastes that have specifically been "listed" as hazardous by the Environmental Protection Agency and, in addition, wastes that exhibit certain characteristics (specifically, ignitability, corrosivity, reactivity, or toxicity). See 40 C.F.R. §§ 261.3, 261.20-261.24, 261.30-261.33.

posal tax that, on its face, applies only to waste generated outside of Alabama that is disposed of at commercial hazardous waste disposal facilities within Alabama; waste generated in Alabama is not subject to the tax. The question presented in this case is whether this facially discriminatory tax violates the Commerce Clause.

1. *Regulatory Background.* The treatment and disposal of hazardous waste are strictly regulated under federal law. The Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 *et seq.*, and the regulations promulgated by the Environmental Protection Agency ("EPA") pursuant to that statute (see 40 C.F.R. Parts 260-271), impose elaborate requirements for the safe handling and disposal of hazardous waste. One of Congress's principal objectives in enacting the RCRA was to "assur[e] that hazardous waste management practices are conducted in a manner which protects human health and the environment." 42 U.S.C. § 6902(a)(4). As the Eleventh Circuit has stated, "[t]he RCRA establishes a framework for regulating the storage and disposal of hazardous wastes in general. . . . The regulations promulgated pursuant to the RCRA ensure that facilities disposing of hazardous wastes do so in a manner consistent with eliminating health and environmental risks caused by the hazardous wastes." *Alabama v. United States Environmental Protection Agency*, 871 F.2d 1548, 1552 (11th Cir.), cert. denied, 493 U.S. 991 (1989) (citations omitted).

Federal law recognizes that hazardous waste is an unavoidable by-product of virtually all industrial processes and that, for the foreseeable future, some

hazardous waste must be disposed of in landfills.² Congress in 1984 specified that land disposal of hazardous waste would be permitted only after such waste is treated with the "best available demonstrated technology," or in compliance with the applicable treatment standard, in order to reduce the waste's toxicity or mobility. 42 U.S.C. § 6924. The EPA has promulgated regulations setting forth these technological requirements. See generally 40 C.F.R. Part 268; 55 Fed. Reg. 22520, 22523 (1990).

The RCRA specifically provides that all operators of hazardous waste treatment, storage, or disposal facilities must obtain permits fixing the terms on which the operator may engage in those activities. 42 U.S.C. § 6925. In addition, the EPA has set forth in great detail (covering roughly 700 pages in the Code of Federal Regulations) standards for operation of hazardous waste treatment, storage, and disposal facilities. See 40 C.F.R. Parts 264-268. Among other things, the regulations prescribe location standards designed to ensure that facilities are not sited in geologically inappropriate locations. 40 C.F.R. § 264.18. They also specify design requirements. *E.g., id.* § 264.301. In addition, the regulations set standards for training of personnel (*id.* § 264.16), inspecting facilities (*id.* § 264.15), minimizing the likelihood of an emergency (*id.* §§ 264.30-264.37), and responding quickly in the event of an emergency (*id.* §§ 264.50-264.56).³

² For example, many hazardous wastes may be treated by incineration, but the resulting ash must be disposed of in a hazardous waste landfill.

³ Alabama also regulates waste disposal. For example, it requires a facility operator to obtain regulatory approval

The regulations make the facility operator responsible for ensuring the containment of hazardous waste disposed of at that site and for undertaking corrective action in the event of a release. 40 C.F.R. §§ 264.100-264.120. In addition, the operator must provide "financial assurances" demonstrating the availability of funds to cover the closure of the facility and post-closure care for 30 years as well as liability insurance for injuries to third parties. 40 C.F.R. §§ 264.140-264.147; see also 42 U.S.C. § 9607.⁴ Finally, in the event the foregoing resources prove inadequate, generators, brokers, and transporters of the waste disposed of at a hazardous waste disposal facility are jointly and severally liable for the costs of remedial action if hazardous waste is released from such a facility. 42 U.S.C. § 9607.

Federal law also comprehensively regulates the transportation of hazardous materials. See 49 U.S.C. App. §§ 1801-1819; 49 C.F.R. Parts 171-180 (1990). Among other things, these provisions require transporters of hazardous materials to register with and

prior to the disposal of each and every waste stream. Ala. Admin. Code r. 335-14-3-.08(3). And it has sought to add an additional layer of protection by requiring that personnel from the Alabama Department of Environmental Management "comprehensively monitor all commercial sites for the disposal of hazardous waste." Ala. Code § 22-30-4(b). This monitoring function includes, but is not limited to, "monitoring of transportation near the site, monitoring of testing procedures, monitoring of the unloading of wastes, monitoring of waste storage, monitoring of waste disposal and monitoring of on site and off site areas of known or suspected contamination." *Id.* § 22-30-4(b)(2). The cost of these functions is financed by a tax of \$1 per ton on waste disposed of at the commercial site. *Id.* § 22-30-4(b)(2).

⁴ Alabama requires similar financial assurances. See Ala. Admin. Code rr. 335-14-5-.08, 335-14-6-.08.

obtain safety permits from the Secretary of Transportation (49 U.S.C. App. § 1805) and set forth packaging requirements and specifications for shipping containers (49 C.F.R. §§ 173.300, 173.510; *id.* Part 178), procedures for loading and unloading (*id.* § 177.834), and procedures to be followed if a vehicle carrying hazardous materials becomes disabled or is involved in an accident or if a container holding hazardous materials leaks in transit (*id.* §§ 177.854-177.860). In addition, federal law requires transporters of hazardous materials to demonstrate financial responsibility of at least \$5 million to cover the cost of remediating any spill of such materials that may occur in transit. Pub. L. No. 101-615, § 23, 104 Stat. 3244, 3272 (1990).⁵

2. *The Interstate Hazardous Waste Market.* The hazardous waste market is manifestly interstate in nature. As discussed in detail in the amicus briefs filed at the petition stage by American Iron and Steel Institute ("AISI") *et al.*, and Hazardous Waste Treatment Council ("HWTC") *et al.*, the numerous types of hazardous wastes require a variety of treatment and disposal methods. Not every state has a facility appropriate for the treatment of all hazardous wastes generated there. Indeed, because of the diverse treatment and disposal processes required for different types of waste, the economies of scale asso-

⁵ Alabama also regulates the transportation of hazardous wastes. See Ala. Admin. Code r. 335-14-1. Among other things, it requires transporters of such wastes to take immediate action to protect human health and the environment in the event of a discharge during transportation (Ala. Admin. Code r. 335-14-1-.03(1)) and requires them to back up that commitment with certain mandatory financial assurances (*id.* at r. 335-14-1-.04).

ciated with each process, and the geologic and other characteristics necessary for construction of safe disposal facilities, no state could possibly provide for the safe disposal of every type of waste generated within its borders. There is accordingly an unavoidable need to ship wastes in interstate commerce. HWTC Br. 3-6; AISI Br. 10-11, 12-14.⁶

The average state sends hazardous wastes to 19 states and receives hazardous wastes from 19 states. AISI Br. 10. And, although it is a net importer of waste, Alabama sends over 50,000 tons of waste per year to a total of 23 other states. *Ibid.* Alabama, like virtually every state in the Union, cannot do without the interstate market for hazardous waste.

3. *The Emelle Facility.* CWM's Emelle facility has received a RCRA permit from the EPA, as well as a separate permit—issued by the EPA pursuant to the Toxic Substances Control Act, 15 U.S.C. §§ 2601 *et seq.*—authorizing the disposal of polychlorinated biphenyls ("PCBs") at the facility. The Emelle facility also is regulated under Alabama law. Currently, the facility is authorized to operate pursuant to the interim status procedures set forth in Ala. Code § 22-30-12(i).

A substantial amount of the waste disposed of at the Emelle facility is generated in states other than Alabama and moves in interstate commerce to the Emelle facility. The trial court found that "[e]ighty-five to ninety percent of the tonnage permanently buried at Emelle is from out-of-state." Pet. App. 58a. Indeed, the facility plays a critical role in the safe

⁶ For example, only eight land disposal facilities in the country are authorized to dispose of polychlorinated biphenyls ("PCBs").

disposal of the Nation's hazardous waste. As the United States has observed, "Emelle is important from a nationwide perspective because it is the largest hazardous waste management facility in the United States and the ultimate depository for over one third of the waste materials shipped off-site from Superfund [cleanup] sites." Brief for the United States at 9, *National Solid Wastes Management Ass'n v. Alabama Dep't of Environmental Management* ("NSWMA"), 910 F.2d 713 (11th Cir. 1990), modified, 924 F.2d 1001, cert. denied, 111 S. Ct. 2800 (1991). See also AISI Br. 3, 7.

4. *Alabama's Efforts To Impede The Disposal Within The State Of Waste Generated In Other States.* Alabama's undisguised animosity toward interstate commerce in hazardous waste is well-documented. As early as 1987, Governor Hunt stated that he "wish[ed] to make it absolutely clear that we will take any and all action available to us to keep out-of-state waste out of Alabama." J.A. 57. Since then the State repeatedly has acted on the Governor's threat to use every means available to prevent the disposal within Alabama of hazardous waste generated in other states.

The State began its assault on interstate commerce in 1987 immediately after the EPA granted the Emelle facility a final permit under RCRA. The State and four citizens' organizations appealed the decision to the Administrator of the EPA, who refused to rescind the permit. They then appealed to the Eleventh Circuit, which affirmed the Administrator's decision upholding the granting of the permit. *Alabama ex rel. Siegelman v. United States Environmental Protection Agency*, 911 F.2d 499 (11th Cir. 1990).

In 1988 Governor Hunt and other state officials initiated a second legal action, this time aimed at halting the cleanup of an abandoned waste site in Texas because the PCB waste was to be disposed of at the Emelle facility. This effort to stop the flow of waste at Alabama's borders, like the State's attempt to block the facility's operating permit, was rebuffed by the Eleventh Circuit. Though dismissing the case on standing and jurisdictional grounds, that court stated that "[t]o the extent plaintiffs * * * assert injury based on the out-of-state nature of these wastes, the Supreme Court has already held that the commerce clause bars such a distinction." *Alabama v. United States Environmental Protection Agency*, 871 F.2d at 1555 n.3.⁷

Undeterred by this latest rebuff, the Legislature enacted Ala. Act No. 89-788 (codified at Ala. Code § 22-30-11(b)) in May 1989. That measure, popularly known as the Holley Bill, barred any commercial hazardous waste disposal facility located in Alabama from treating or disposing of hazardous waste generated outside Alabama if the State in which the waste was generated either (1) prohibited the treatment or disposal of hazardous waste within its borders and had no hazardous waste treatment or disposal facility; or (2) had no facility within the State for the treatment or disposal of hazardous waste and had not entered into an interstate or regional waste disposal agreement to which Alabama was a signatory. CWM brought suit in federal court, and the Eleventh

⁷ The Eleventh Circuit subsequently questioned Alabama's "good faith" in bringing the action. *Alabama ex rel. Siegelman v. United States Environmental Protection Agency*, 925 F.2d 385, 390-391 n.6 (11th Cir. 1991).

Circuit ultimately held the statute invalid under the Commerce Clause. The court found that "[o]n its face, the Holley Bill discriminates among out-of-state waste generators and imposes on these generators the burden of conserving Alabama's remaining hazardous waste disposal capacity." *NSWMA*, 910 F.2d at 720. Because the statute "distinguish[ed] among wastes based on their origin, with no other basis for the distinction," the Eleventh Circuit concluded that it violated the Commerce Clause. *Ibid.*

5. *The Challenged Statute.* In 1990, Alabama continued its assault on out-of-state waste by enacting Ala. Act No. 90-326 (codified at Ala. Code §§ 22-30B-1.1 *et seq.*), the statute at issue in this case. The Act imposes a fee of \$72 per ton ("the Additional Fee"), which is, by its express terms, limited to waste generated outside Alabama and disposed of at commercial hazardous waste disposal facilities within Alabama. Waste generated within Alabama and disposed of at such facilities is not subject to this tax. See Ala. Code § 22-30B-2(b).⁸ The Act also imposes a "Base Fee" of \$25.60 per ton on all waste disposed of at such facilities regardless of its origin. Finally, the Act contains a provision that restricts the amount of waste that can be disposed of at commercial hazardous waste disposal facilities during any

⁸ Specifically, the Additional Fee provision states:

For waste and substances which are generated outside of Alabama and disposed of at a commercial site for the disposal of hazardous waste or hazardous substances in Alabama, an additional fee shall be levied at the rate of \$72.00 per ton.

Ala. Code § 22-30B-2(b) (emphasis added).

one-year period ("the Cap Provision").⁹ The cap was fixed at the amount of waste received at such facilities during the year beginning July 15, 1990 ("the benchmark period")—the day the new fees took effect. See *id.* § 22-30B-2.3.

Act No. 90-326 was intended to discourage the disposal of out-of-state waste in Alabama. During the Legislature's consideration of the Act, Governor Hunt stated:

[W]e've got to do something to stop the flow of hazardous waste into the state, to force other states to get their incinerators and do [the] job that they ought to do and that we've got a right to expect them to do. I'd be tickled to death to get both that increase [in disposal fees] and the cap bill signed into law.

J.A. 63. Other state officials made similar pronouncements during the legislative proceedings. For example, the Director of the Alabama Department of Environmental Management ("ADEM") testified before the Senate Finance and Taxation Committee that he hoped and expected that the law would substantially lower the amount of out-of-state waste disposed of in Alabama. J.A. 114 (Pegues Dep.).

When Governor Hunt signed Act No. 90-326 into law, he reiterated the discriminatory intention underlying the legislation, stating:

On the day I took office just over three years ago, toxic waste producers in other states could drive their problems to Alabama and dump them for

⁹ Alabama structured the Cap Provision to apply *only* to the Emelle facility by exempting all facilities that disposed of less than 100,000 tons of hazardous waste during the year beginning July 15, 1990.

only \$6 a ton. But today, Alabama is taking down the sale sign. With this law it's going to cost \$112 a ton to bring hazardous waste into Alabama from other states. Let the message go out. There are no more environmental bargains to be found here.

J.A. 66.¹⁰ See also *ibid.* ("Today we will take an important step toward scratching Alabama's name off [the] list of favorite places to dump hazardous waste.").

6. *The Proceedings Below.* In May 1990, CWM commenced this action in Alabama circuit court challenging the Additional Fee, the Base Fee, and the Cap Provision on federal and state constitutional grounds.¹¹ Following a trial, the circuit court held that the Additional Fee violated the Commerce Clause, but rejected CWM's challenges to the other provisions.

The circuit court found that "the Additional Fee facially discriminates against waste generated in States other than Alabama * * *. By its very terms, the fee applies *only* to out-of-state waste. Waste generated within Alabama * * * is completely exempted from the Additional Fee." Pet. App. 85a (emphasis in original).

The circuit court determined that the detailed federal and state regulations applicable to hazardous waste might not eliminate all conceivable risks from the transportation and disposal of such substances.

¹⁰ In addition to the \$72 per ton Additional Fee and the \$25.60 per ton Base Fee, other provisions of Alabama law imposed exactions totalling \$14.40 per ton.

¹¹ CWM was barred from proceeding in federal court by the Tax Injunction Act, 28 U.S.C. § 1341.

For example, the court observed that "leachate"—the liquid resulting when rainwater or groundwater comes into contact with waste buried at a disposal site—may have migrated from some of the older (pre-RCRA) disposal trenches at the Emelle facility into the 700 foot thick layer of chalk that lies beneath those trenches. Pet. App. 60a.¹²

The circuit court also noted that "depending upon its severity, an earthquake could unseal cracks in the chalk and open avenues for the movement of leachate and hazardous wastes" and, in addition, referred to possible "risks" that might arise after CWM ends disposal activity at the Emelle facility. Pet. App. 62a, 63a.¹³ With respect to transportation of waste, the court stated that "[a]s in the operation of the facility, transportation of these wastes, no matter how elaborate the precautions, also creates unquantifiable risk or uncertainty to the public health and to the environment." *Id.* at 62a.

Despite its findings that some uncertainty is inherent in the management of hazardous waste, the trial court rejected the State's proffered environmental and safety justifications for singling out waste from other states:

[H]azardous waste generated in Alabama is just as dangerous as such waste generated in other

¹² However, it stated that "[t]here are widely varying estimates as to travel time" through the chalk; the possibilities range from 330 to 10,000 years. Pet. App. 60a. "Those transit time estimates all involve complicated calculations based upon highly variable factors." *Ibid.*

¹³ Notwithstanding these findings regarding contingent risks, even Governor Hunt recognizes that the Emelle facility is "probably one of the safest such facilities in the country." J.A. 66.

states. All of the safety and environmental concerns set forth at trial * * * apply with equal force to hazardous waste generated in and out of the State of Alabama. * * * This Court finds that the record contains no evidence of any difference between in-state waste and out-of-state waste other than the waste's state of origin.

Id. at 86a.

The circuit court made clear that Alabama remains free to address its environmental and safety concerns as long as it does so in a nondiscriminatory fashion. Thus, if the State wants to encourage production techniques that minimize the amount of waste generated, it can "impose a mandatory fee that falls evenhandedly on both in-state waste and out-of-state waste * * *." Pet. App. 87a. Alternatively, "the State could constitutionally charge a higher fee based on the degree of dangerousness [or] the nature of the waste * * *." *Id.* at 87a-88a. "What the Commerce Clause forbids is a significantly heavier burden that is imposed by the Additional Fee based on the origin of the waste." *Id.* at 88a.

The circuit court also concluded that the Additional Fee could not be justified on the ground that it imposes on out-of-state waste generators their fair share of the costs to Alabama of waste disposal facilities located within the State. The court found insufficient evidence that in-state generators bore a disproportionate share of these costs prior to the enactment of the Additional Fee and no evidence that the Fee equalized the burden on in-state and out-of-state generators. Pet. App. 88a n.6. For these reasons, the court concluded that the Additional Fee violates the Commerce Clause.

Turning to the question of the appropriate relief, the circuit court observed that "[i]f a state requires a taxpayer to pay a tax prior to obtaining a determination of its validity, the Due Process Clause * * * requires that a post-payment remedy be provided." Pet. App. 90a (citing *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990)). It further stated that "[u]nder *McKesson* the past discrimination may be cured either by a refund, by a retroactive increase in the lower discriminatory tax rate, or by a combination of a partial refund and a partial retroactive increase." Pet. App. 90a. The court concluded that the decision as to the proper backward-looking remedy should in the first instance be made by the political branches. *Id.* at 91a. It therefore refrained from selecting a remedy, but retained jurisdiction in order to ensure that the discrimination actually is remedied consistent with *McKesson*. *Ibid.*

The circuit court went on to note that although it found no constitutional defect in the Cap Provision itself, the discriminatory Additional Fee had tainted the amount of the cap by depressing volumes during the benchmark period. Pet. App. 92a-93a. The court stated that this taint would be removed if the State were to remedy the discriminatory Additional Fee by retroactively imposing it on in-state waste. *Id.* at 93a. On the other hand,

if the remedy implemented involves payment of a refund, in whole or in part, then the Plaintiff's payments during the benchmark period will have been increased by an unconstitutional fee. In that event some form of relief, which may include establishment of a new benchmark period or an injunction against enforcement of a cap

which perpetuates the effects of discriminatory fees, will be necessary. * * * The volume cap for future years may not be based on a benchmark period which includes any time during which an unconstitutionally discriminatory fee was assessed.

Ibid. Accordingly, the court retained jurisdiction and indicated its intention to "entertain an appropriate motion by Plaintiff seeking such relief as may be necessary to remedy the discrimination in the event the State does not do so, including relief from the effect of discriminatory fees on the volume cap."

Ibid.

The Alabama Supreme Court reversed the circuit court's ruling that the Additional Fee is unconstitutional, while affirming the lower court's rejection of the challenges to the Base Fee and the Cap Provision. According to the state supreme court, this Court's decisions "make a distinction between state measures that discriminate arbitrarily against out-of-state commerce in order to give in-state interests a commercial advantage, i.e., simple economic protectionism, and state measures that seek to protect public health or safety or the environment." Pet. App. 41a. The court found that the Additional Fee differed from the facially discriminatory bans on out-of-state waste invalidated in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), and *NSWMA* because it "has not been enacted for the purpose of economic protectionism." Pet. App. 44a. Based on the asserted inapplicability of those decisions, the court determined that the Additional Fee

serves these legitimate local purposes that cannot be adequately served by reasonable nondiscrim-

inatory alternatives: (1) protection of the health and safety of the citizens of Alabama from toxic substances; (2) conservation of the environment and the state's natural resources; (3) provision for compensatory revenue for the costs and burdens that out-of-state waste generators impose by dumping their hazardous waste in Alabama; (4) reduction of the overall flow of wastes traveling on the state's highways, which flow creates a great risk to the health and safety of the state's citizens.

Ibid.

The state supreme court concluded that "[t]here is nothing in the Commerce Clause that compels the State of Alabama to yield its total capacity for hazardous waste disposal to other states. To tax Alabama-generated hazardous waste at the same rate as out-of-state waste is not an available nondiscriminatory alternative, because Alabama is bearing a grossly disproportionate share of the burdens of hazardous waste disposal for the entire country." Pet. App. 45a-46a.

Justice Houston concurred in the judgment. Pet. App. 48a-49a. He asserted that hazardous waste is not "an article of commerce protected by the Commerce Clause" and stated that the Alabama Supreme Court should not conclude otherwise until directed to by this Court. *Id.* at 48a.

CWM filed a petition for a writ of certiorari seeking review of the Alabama Supreme Court's rejection of the Commerce Clause challenges to the Additional Fee, the Base Fee, and the Cap Provision. This Court granted the petition only with respect to the Commerce Clause challenge to the Additional Fee.

SUMMARY OF ARGUMENT

The Framers of our Constitution sought to avoid the commercial rivalries among states that festered under the Articles of Confederation by mandating economic as well as political union. The Framers recognized that the states were in fact economically interdependent and that the Nation would therefore be strongest without artificial barriers obstructing commerce among the states. The Commerce Clause fosters this ideal by prohibiting the states from discriminating against goods originating in other states and from seeking to reserve privately-owned resources for their own citizens.

The facially discriminatory tax at issue here, and the Alabama Supreme Court's decision upholding it, comprise nothing less than a frontal assault on these basic Commerce Clause principles. The notion that Alabama may in effect erect an "interstate waste keep out" sign at the Emelle facility is grounded in the very parochialism that the Framers sought to eradicate. Indeed, the tax is constitutionally indistinguishable from the ban on disposal of interstate waste held to violate the Commerce Clause in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

The \$72 per ton Additional Fee indisputably discriminates against out-of-state waste on its face. The court below nonetheless refused to invalidate it, asserting that discriminatory laws are entirely permissible as long as the state's purpose is not "protectionism." This Court definitively rejected that precise argument, however, in *City of Philadelphia*. The State's other justifications for the Additional Fee are similarly flawed.

Because the trial court found that "hazardous waste generated in Alabama is just as dangerous as such waste generated in other states" (Pet. App. 86a), the State's "health and safety" concerns cannot justify the discriminatory Additional Fee, just as this Court held that such concerns could not save the discriminatory statute in *City of Philadelphia*. Assuming that a tax is necessary to address potential health and safety concerns, an even-handed tax would *better* serve those goals than would a tax that falls only on waste from out of state.

Nor is discrimination an acceptable means of conserving disposal capacity. This Court already has made that clear in precisely this context, holding that "a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." *City of Philadelphia*, 437 U.S. at 627.

The goal of ensuring that out-of-state generators contribute their fair share of future response costs is fully addressed by basing the fee on tonnage. Under a per-ton tax, out-of-state generators pay more taxes because they dispose of more tons of waste. A discriminatory fee does not ensure that they pay their fair share; it ensures that they pay an unfair share.

The related contention that the Additional Fee is a compensatory tax (and therefore is not really discriminatory) is equally misguided. This Court has accepted such a defense only when the challenged tax serves to complement a substantially equivalent tax borne by in-state interests. The State never has identified a substantially equivalent tax that is borne only by in-state waste generators.

Finally, a discriminatory *disposal* fee is far from necessary to address Alabama's transportation-related concerns. For one thing, federal and state law already comprehensively regulate transportation of hazardous waste; if those regulations are insufficient, they may be supplemented on an even-handed basis. Apart from regulation, an even-handed tax would be a better means of dealing with the State's purported concerns. Yet, Alabama does not apply a similar tax to waste generated in the State no matter how many miles it travels on Alabama roads. Plainly, the Additional Fee is neither the most effective nor the least discriminatory means of achieving Alabama's transportation-related objectives.

Because the Additional Fee fails to survive "the strictest scrutiny" required by this Court's precedents, the judgment of the Supreme Court of Alabama should be reversed. The Court should remand the case to allow CWM to obtain the backward-looking relief required by *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990), including redress of the separate injury resulting from the fact that the permanent cap on annual disposal volume now applicable to the Emelle facility was based on disposal volumes that were artificially depressed by the unconstitutional fee.

ARGUMENT

THE FACIALLY DISCRIMINATORY \$72 PER TON ADDITIONAL FEE VIOLATES THE COMMERCE CLAUSE

A. Laws That Discriminate Against Interstate Commerce On Their Face Are Subject To A Virtually Per Se Rule Of Invalidity Under The Commerce Clause.

When this Nation's founders met to consider a Constitution, they were convinced that "in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-326 (1979). From that conviction sprang the Commerce Clause, which granted Congress the power to regulate interstate commerce and curtailed the right of the States to do the same. *Id.* at 326. Accord *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 (1992); *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35 (1980). As this Court has recognized, "[n]o other federal power was so universally assumed to be necessary, no other state power was so readily relinquished." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534 (1949).

The "very purpose" of the Commerce Clause was to establish "an area of free trade" among the states, by forbidding them to impose tariffs or other barriers against each other's products and trade. *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944). See also *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 170 (1954); *H.P. Hood & Sons*, 336 U.S. at 537-539. Thus, for well over a century it has

been "settled that no State can, consistently with the Federal Constitution, impose upon the products of other States * * * more onerous public burdens or taxes than it imposes upon the like products of its own territory." *Guy v. City of Baltimore*, 100 U.S. 434, 439 (1880). See also *Walling v. Michigan*, 116 U.S. 446, 455 (1886) ("[a] discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State, is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States"); *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984) ("a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State").¹⁴

¹⁴ The Court has applied this anti-discrimination rule to strike down dozens of tax statutes that, like the Additional Fee, discriminated against interstate commerce on their face. Representative cases include *New Energy, supra* (provision awarding fuel dealers tax credit against Ohio fuel sales tax for each gallon of ethanol sold, but only if ethanol was produced in Ohio or in a state that grants similar tax advantages for Ohio ethanol); *Tyler Pipe Indus., Inc. v. Washington State Dep't of Rev.*, 483 U.S. 232 (1987) (exemption from manufacturing tax available only for locally manufactured products sold within the state, not for locally manufactured products sold outside the state); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (exemption from liquor sales tax for two locally produced beverages); *Armco, supra* (provision exempting local manufacturers from gross receipts tax); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984) (franchise tax credit available only to extent products are shipped from within New York); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (series of exemptions from and credits against Louisiana first use and severance taxes for gas consumed or

Accordingly, facial discrimination against interstate commerce "by itself may be a fatal defect, regardless of the State's purpose." *Hughes*, 441 U.S. at 337. See also *Wyoming v. Oklahoma*, 112 S. Ct. at 800; *City of Philadelphia*, 437 U.S. at 624 ("where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected"). To the extent facial discrimination is not *per se* unconstitutional, the state's burden of justification is "high": the discriminatory statute must be invalidated unless the state can show that the law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy*, 486 U.S. at 278. See also *Wyoming v. Oklahoma*, 112 S. Ct. at 800. A court must engage in "the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Hughes*, 441 U.S. at 337. As we now discuss, the Additional Fee fails this very strict test.

B. The Additional Fee Fails The Strict Scrutiny Test.

It is undisputed that the Additional Fee on its face discriminates against interstate commerce. The fee applies only to waste generated outside of Alabama

produced in Louisiana); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977) (provisions of transfer tax on securities transactions that expressly accorded preferential tax treatment to in-state sales); *I.M. Darnell & Son v. City of Memphis*, 208 U.S. 113 (1908) (exemption from Tennessee property tax for Tennessee agricultural products, but not for agricultural products brought in from other states); *Walling, supra* (tax on liquors produced out-of-state and sold in-state); *Guy, supra* (user fee imposed on vessels carrying products of other states but not on vessels carrying Maryland products); *Welton v. Missouri*, 91 U.S. 275 (1876) (license tax imposed on peddlers of out-of-state goods).

and brought into Alabama for disposal. There also is no doubt that such waste (whether hazardous or non-hazardous) is an article of commerce protected under the Commerce Clause. As this Court observed in holding that solid waste is an article of commerce, "[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." *City of Philadelphia v. New Jersey*, 437 U.S. at 622 (emphasis added). Thus, because it discriminates on its face against an article of interstate commerce, the Additional Fee must be subjected to "the strictest scrutiny"—a level of scrutiny that this Court's decision in *City of Philadelphia v. New Jersey* makes plain it cannot survive.

1. The unconstitutionality of the Additional Fee is established by *City of Philadelphia v. New Jersey*.

In *City of Philadelphia*, the Court held invalid under the Commerce Clause a New Jersey statute that barred the disposal within that State of waste generated in other states, while permitting unrestricted disposal of New Jersey waste. The Court explained that the Commerce Clause prevented New Jersey from "discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." 437 U.S. at 626-627. "Both on its face and in its plain effect," the New Jersey statute violated this "principle of nondiscrimination." *Id.* at 627.

The Court observed that "[t]he harms caused by waste are said to arise after its disposal in landfill sites, and at that point, as New Jersey concedes, there is no basis to distinguish out-of-state waste from domestic waste. If one is inherently harmful, so is the

other. Yet New Jersey has banned the former while leaving its landfill sites open to the latter." 437 U.S. at 629. The statute thus was "an obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse into New Jersey's remaining landfill sites. That legislative effort is clearly impermissible under the Commerce Clause." *Ibid.*

The \$72 Additional Fee is indistinguishable from the statute held invalid in *City of Philadelphia*: it discriminates against out-of-state waste precisely because of the waste's state of origin.¹⁵ There can be no dispute that the purpose and effect of the Additional Fee are to discourage the disposal within Alabama of waste generated in other states (see pages 11-12, *supra*), while exempting from that burden waste generated within Alabama. That is precisely what *City of Philadelphia* forbids.

Despite *City of Philadelphia*'s clear holding, the Alabama Supreme Court found the facially discriminatory Additional Fee constitutional on two related grounds. First, the court stated that *City of Philadelphia*'s antidiscrimination principle does not apply if the discrimination is motivated by health and safety concerns. Second, it identified several legitimate state interests that it concluded could not be achieved by less discriminatory means. Neither of these rationales can save the Additional Fee, however.

¹⁵ The Alabama Supreme Court did not identify a reason "apart from [its] origin" to treat out-of-state waste differently than in-state waste. As the trial court found (Pet. App. 83a-84a), there simply is no such justification in the record in this case.

2. The Alabama Legislature's supposed nonprotectionist motivation provides no basis for distinguishing this case from *City of Philadelphia*.

The Alabama Supreme Court refused to apply *City of Philadelphia*'s anti-discrimination principle to the Additional Fee, reasoning: "*City of Philadelphia v. New Jersey* does not hold that a state may not limit importation of wastes to protect health and the environment; it holds that a state may not do so for 'simple economic protectionism.'" Pet. App. 42a.

This effort to avoid *City of Philadelphia*'s dispositive force is doubly misguided. In the first place, the state supreme court clearly erred in assuming that a heavy tax borne only by out-of-state manufacturers does not provide competing local manufacturers with a substantial competitive advantage. As a result of the Additional Fee, Alabama businesses that generate hazardous waste as a by-product of their manufacturing processes have significantly lower costs than otherwise identical out-of-state companies that are not fortunate enough to have one of the nation's safest hazardous waste disposal facilities in their home states.¹⁶ The use of a tax to raise out-of-state companies' costs of doing business is the essence of protectionism. See, e.g., *Boston Stock Exchange*, 429 U.S. at 330-331; *Brimmer v. Rebman*, 138 U.S. 78, 82-83 (1891); *Walling*, 116 U.S. at 455.

Moreover, this Court's decisions expressly and conclusively reject the Alabama Supreme Court's "dis-

¹⁶ Whether or not this was an intended consequence of the Additional Fee is irrelevant. "A finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose or discriminatory effect." *Bacchus Imports*, 468 U.S. at 270 (citations omitted).

inction" based on subjective legislative motivation. For example, in *City of Philadelphia* itself, New Jersey "den[ied] that [its statute] was motivated by financial concerns or economic protectionism" and contended that it was designed "to protect the health, safety and welfare of the citizenry at large." 437 U.S. at 626 (citation omitted). The Court found New Jersey's actual motive irrelevant, stating:

[I]t does not matter whether the ultimate aim of [the statute] is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. * * * But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.

Id. at 626-627. The Court has reiterated this point on several occasions. See, e.g., *New Energy*, 486 U.S. at 279 n.3 (even if state legislature was motivated by a subjective purpose to protect public health, that purpose was "inadequate to validate patent discrimination against interstate commerce"); *Maine v. Taylor*, 477 U.S. 131, 148-149 n.19 (1986) (the *City of Philadelphia* standard applies "not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade").¹⁷ Thus, the de-

¹⁷ The Alabama Supreme Court stated (Pet. App. 42a) that *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), supported its reading of *City of Philadelphia*. In fact, that decision reaffirmed *City of Philadelphia*'s conclusion that "[a]

cision below simply cannot be reconciled with *City of Philadelphia*.

3. *The Additional Fee is not the least discriminatory means of achieving any legitimate governmental interest.*

There can be no doubt that Alabama's sole goal in enacting the \$72 fee was to obstruct the flow of interstate commerce into the State. The record is replete with evidence of this purpose. See pages 11-12, *supra*.¹⁸ However, respondents apparently have learned from their recent judicial experiences (see pages 8-10, *supra*) that a desire to close the State's borders to interstate commerce cannot save a discriminatory measure from invalidation under the Commerce Clause. They accordingly have advanced alternative justifications for the State's blatant discrimination here. The Alabama Supreme Court accepted these arguments, stating (Pet. App. 44a) that

court may find that a state law constitutes 'economic protectionism' on proof *either* of discriminatory effect or of discriminatory purpose." 449 U.S. at 471 n.15 (citations omitted; emphasis added).

¹⁸ During the course of this litigation, the State repeatedly has acknowledged the discriminatory purpose underlying the legislation. For example, during oral argument at the preliminary injunction stage, counsel for respondent Hunt admitted that the purpose of the Additional Fee was to "discourage other people from sending their hazardous waste down here * * *." J.A. 4. Similarly, in a letter to the trial court at the summary judgment stage, counsel for respondent Sizemore stated that CWM "correctly observes that the purpose of the \$72.00 additional fee is to discourage the shipment of dangerous waste materials to Alabama for permanent storage." R. 1341 (letter dated Aug. 29, 1990 from William D. Coleman to Hon. Joseph Phelps).

the Additional Fee promotes four legitimate purposes that could not be served adequately through less discriminatory means. As the United States observed in its amicus brief at the petition stage (at 8), each of the State's putative purposes "can effectively be served by non-discriminatory enactments" and therefore none "justify the Additional Fee requirement's discriminatory treatment of wastes generated out-of-state."

a. Health and safety. The first purpose identified by the Alabama Supreme Court is "protection of the health and safety of the citizens of Alabama from toxic substances." Pet. App. 44a. As the trial court expressly found, however (and the state supreme court did not dispute), "hazardous waste generated in Alabama is just as dangerous as such waste generated in other states." *Id.* at 86a. Accordingly, to the extent the State deems the existing comprehensive federal and state regulatory regimes (see pages 3-6, *supra*) insufficient to protect public health and safety, the State's interest plainly can be served at least as well (and probably better) by additional nondiscriminatory disposal regulations or by a non-discriminatory per-ton tax applicable to *all* waste disposed of within Alabama. That is what this Court concluded with respect to the identical argument in *City of Philadelphia*, 437 U.S. at 629; accord *New Energy*, 486 U.S. at 279.¹⁹

¹⁹ An even-handed per ton tax is a complete answer to respondents' argument that the health and safety risks from out-of-state waste are greater because there is more of it. Such a tax fully takes into account differences in volume: most of the revenue generated will be from disposal of out-of-state waste if most of the waste disposed of comes from

Respondents argue that *Maine v. Taylor*, *supra*, supports their position, but that case is easily distinguishable. *Taylor* involved a Maine statute that banned the importation of out-of-state baitfish. This Court measured the constitutionality of the statute under the strict scrutiny standard applicable to laws that discriminate against interstate commerce. It upheld the statute only because Maine had "legitimate reasons, 'apart from their origin, to treat [out-of-state baitfish] differently.'" 477 U.S. at 152 (quoting *City of Philadelphia*, 437 U.S. at 627). Specifically, the out-of-state baitfish had a physical characteristic—the presence of parasites—that was "not common to wild fish in Maine." 477 U.S. at 141. The State proved that no measure short of a complete ban would allow it effectively to exclude fish with parasites; existing sampling and inspection procedures simply were not adequate. *Id.* at 146. The Court for that reason upheld the statute.²⁰

Taylor thus rested squarely on this Court's determination that the record established that out-of-state baitfish were in fact different from and posed a substantially different threat to the environment than

out of state. There is no need for an additional, discriminatory fee to ensure that whatever category of generators disposes of the most waste also pays the most taxes.

²⁰ The State also argued that its ban was necessary because non-native species that could pose a threat to Maine's aquatic ecology might be inadvertently included in shipments of species that were already present in Maine. Recognizing that there was considerable evidence that Maine could ensure against importation of non-native species without resorting to a ban on importation of all baitfish, this Court limited its review to the State's interest in avoiding introduction of parasites. See 477 U.S. at 143 n.14.

in-state baitfish. Here, by contrast, the record reflects—and the trial court found—that out-of-state waste is *not* different from and does *not* pose a different threat than in-state waste. See pages 13-14, *supra*. *Taylor* is therefore inapplicable in this case.²¹

Respondent Sizemore labors mightily to mold *Taylor* to fit the present case. Citing the fact that "some" of the parasites in the *Taylor* baitfish had been found in Maine fish and that non-Maine fish could swim into Maine waters, Sizemore asserts that the Court did not rest its decision on the disparate environmen-

²¹ The quarantine cases referred to by respondents (Hunt Br. in Opp. 11 n.8; Sizemore Br. in Opp. 13-15 & nn. 6, 8) also are inapposite. As this Court has observed, those cases stand for the narrow proposition that a state may ban the importation of items "such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils. Those laws thus did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin." *City of Philadelphia*, 437 U.S. at 628-629. In contrast, the Additional Fee is not aimed at preventing the movement of hazardous waste "whatever [its] origin," but instead is directed solely at hazardous waste transported from other states for disposal in Alabama. The fee does not apply at all to waste generated in Alabama and transported to other parts of the State for disposal. Nor does it apply to waste transported through Alabama for disposal outside of Alabama.

Moreover, the quarantine rationale never has been applied outside the context of a flat ban on a particular item. The linchpin of the quarantine cases is the imminence of the threat to the public welfare posed by the banned item. When a State does not ban an item and will let in substantial amounts of that item as long as a hefty duty is paid, the notion that the Commerce Clause's antidiscrimination principle should give way is frivolous.

tal threat from out-of-state fish. In his view, *Taylor* stands for the proposition that a state may tax or regulate out-of-state foods that threaten public health without applying that tax or regulation to in-state goods that present the very same danger to public health. Supp. Br. 2-3.

Sizemore's discussion of the facts of *Taylor* omits one crucial ingredient. Two of the three parasites that were the focus of Maine's concern had *never* been detected in Maine baitfish. As a factual matter, therefore, the out-of-state baitfish were different from Maine baitfish. *United States v. Taylor*, 585 F. Supp. 393, 396 (D. Me. 1984). The substantially different threat to the environment posed by these parasites was critical to the Court's determination that the ban was constitutional. 477 U.S. at 141, 142-143.

Indeed, Sizemore's view of *Taylor* would mean that *Taylor* overruled *City of Philadelphia*, which rested on the determination that the out-of-state waste ban could *not* be justified by any health risk presented by solid waste precisely because that risk was no different from the risk from in-state waste. See 437 U.S. at 629. But *Taylor* plainly did not overrule *City of Philadelphia*. Rather, relying on the district court's factual findings, the Court upheld the Maine statute only because "Maine ha[d] legitimate reasons, 'apart from their origin, to treat [out-of-state baitfish] differently.'" 477 U.S. at 152 (quoting *City of Philadelphia*, 437 U.S. at 627) (emphasis added)). That difference was the distinct environmental threat from the parasites in out-of-state fish. The factual finding that there is no difference between Alabama waste and out-of-state waste is thus fatal to respondents' purported health and safety justification.

b. *Conservation*. The second state interest invoked by the Alabama Supreme Court is "conservation of the environment and the state's natural resources." Pet. App. 44a. This conservation goal plainly may be achieved through an even-handed tax on all waste disposed of in Alabama regardless of origin. As this Court observed in rejecting an identical conservation justification in *City of Philadelphia*, "a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." 437 U.S. at 627. Accord *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982); *Hughes*, 441 U.S. at 337-338; *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911). That is precisely what Alabama's discriminatory tax is designed to do and precisely what it does.

The long-standing principle that states may not confer upon their residents a preferred right of access to privately owned natural resources is essential to the realization of the Framers' intention to make "our economic unit * * * the Nation" (*H.P. Hood & Sons*, 336 U.S. at 537). Allowing states to hoard such resources on behalf of their citizens would have disastrous consequences for our economic union:

If the states have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. * * * To what consequences does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines.

West, 221 U.S. at 255. Accordingly, just as New Hampshire may not hoard electricity generated with-

in the state (see *New England Power, supra*), Oklahoma may not hoard its minnows (see *Hughes, supra*), New Jersey may not hoard municipal waste disposal capacity (see *City of Philadelphia, supra*), and West Virginia and Oklahoma may not hoard natural gas (see *Pennsylvania v. West Virginia, supra*; *West, supra*), the Commerce Clause bars Alabama from seeking to "conserve" hazardous waste disposal capacity through a discriminatory tax on out-of-state waste.

c. *Compensatory revenue.* The Alabama Supreme Court's third justification for the discriminatory Additional Fee is that the fee provides "compensatory revenue for the costs and burdens that out-of-state waste generators impose by dumping their hazardous waste in Alabama." Pet. App. 44a. This rationale appears to combine two arguments raised by respondents in the courts below, neither of which justifies the discrimination.

One argument is that the fee is a means of ensuring that out-of-state generators contribute their fair share to any future response costs incurred by Alabama as a result of a natural disaster or other event causing a release of hazardous waste into the environment. It is undisputed, however, that the costs and burdens that Alabama might be forced to incur some time in the future as a result of a ton of hazardous waste that is disposed of today will not vary depending on the waste's state of origin. See J.A. 25-26 (testimony of ADEM official Sue Robertson). Accordingly, the State's desire to provide a financial safeguard against the assertedly uncertain future costs and burdens associated with the present disposal of hazardous waste—to the extent such a safeguard is necessary or even appropriate given the fed-

eral protections already in place (see pages 3-6, *supra*)—plainly can be satisfied through nondiscriminatory taxation or regulation of all hazardous waste disposed of in Alabama.²² Moreover, as the United States pointed out in its amicus brief at the petition stage (at 10-11), the state court's underlying assumption—that Alabama will be less able to recover future cleanup costs from out-of-state generators than from in-state generators—is unsupportable:

[F]ederal law provides the State with ample authority to impose the financial costs of cleaning up the Emelle Facility on the generators of the waste—both in-state and out-of-state. * * * Furthermore, it is far from certain that any particular in-state generator, currently exempted from the Additional Fee, will be in existence or located in Alabama when and if clean-up of Emelle is eventually required.

The other argument relating to "compensatory revenue" is that the Additional Fee serves to offset financial burdens imposed by Alabama on in-state generators that are not imposed on out-of-state generators. This Court has made clear, however, that a facially discriminatory tax will be upheld as a "compensatory tax" only if the tax merely counterbalances a "substantially equivalent" tax on intrastate activity. See, e.g., *Maryland v. Louisiana*, 451 U.S. 725, 759 (1981). Comparing the Additional Fee to prop-

²² In fact, the Additional Fee does not provide a safeguard of any kind because the revenues are not set aside in an environmental emergency fund, but instead are "deposited into the general budgetary fund of the state to be used for general operations * * *." Ala. Code § 22-30B-3. Because Alabama is not operating at a surplus, revenues from the Additional Fee are expended soon after they are generated.

erty taxes, income taxes, sales taxes, and the like simply will not do. *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 289 (1987) (“[i]mplementation of a rule of law that a tax is nondiscriminatory because other taxes of at least the same magnitude are imposed by the taxing State on other taxpayers engaging in different transactions would plunge the Court into the morass of weighing comparative tax burdens’”) (citations omitted). As the trial court recognized (Pet. App. 88a n.6), Alabama never has identified a tax that falls exclusively on in-state waste and is “substantially equivalent” to the Additional Fee. Accordingly, the compensatory tax doctrine cannot justify that facially discriminatory fee.

d. *Transportation risks.* The final justification for the Additional Fee invoked by the court below is “reduction of the overall flow of wastes traveling on the state’s highways.” Pet. App. 44a. Of course, merely reducing the flow of goods in interstate commerce is not by itself a legitimate goal under the Commerce Clause. See, e.g., *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 677-678 (1981) (minimizing truck traffic on state’s highways is not a legitimate governmental interest).

A state could have a legitimate interest in seeking to minimize the risks associated with transportation of hazardous waste and to ensure the adequacy of funds to respond to any releases resulting from an accident during transportation. To the extent the extensive federal and state regulatory schemes described above (at pages 5-6) do not already fully address those goals, Alabama has at its disposal a range of nondiscriminatory approaches that do not

require it to resort to a facially discriminatory tax on waste disposal.

For example, the State could increase the stringency of its regulations on an even-handed basis. Alternatively, Alabama could impose an even-handed tax on the transportation of hazardous materials on Alabama roads. Such a tax would not only be nondiscriminatory, it would also more effectively address the State’s putative transportation concerns by not exempting Alabama waste or waste that is being transported *through* Alabama. What Alabama may not do is force only interstate commerce to bear the burden of its asserted concern about transportation safety. See *American Trucking Ass’ns, Inc. v. Secretary of State*, 595 A.2d 1014 (Me. 1991) (invalidating flat fee for hazardous material transportation license and observing that a nondiscriminatory tax would be more rationally linked to the State’s safety purpose); *Illinois v. General Electric Co.*, 683 F.2d 206, 214 (7th Cir. 1982), cert. denied, 461 U.S. 913 (1983) (Illinois’ failure to regulate intrastate shipment of waste and interstate shipments not for disposal within the State rendered argument based on alleged transportation risks “unconvincing”).

* * * * *

In sum, a discriminatory disposal tax is not necessary to address any of Alabama’s putative goals. The Court’s conclusion in *City of Philadelphia* is fully applicable here:

Today, cities [outside Alabama] find it expedient or necessary to send their waste into [Alabama] for disposal, and [Alabama] claims the right to close its borders to such traffic. Tomorrow, cities in [Alabama] may find it expedient or necessary

to send their waste into [other states] for disposal, and those States might then claim the right to close their borders. The Commerce Clause will protect [Alabama] in the future, just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all.

437 U.S. at 629. Any other result would eviscerate the concept of national economic union that lies at the heart of the Commerce Clause. Other states are contemplating discriminatory measures similar to Alabama's (AISI Br. 16); those measures will likely be adopted if Alabama prevails here. States with generators whose waste was effectively embargoed by Alabama (or by other states) might then try to retaliate against Alabama by adopting similar restrictions targeting the products of Alabama industry. The result would be the very economic warfare among the states that the Commerce Clause was intended to prevent.

Moreover, Alabama's contention that it is being burdened unfairly by interstate commerce in waste ignores the integrated nature of our economy. Cars used by the citizens of Alabama may have been manufactured in Michigan or Texas; the gasoline that powers those cars may have been refined in New Jersey or California. Those states bear any environmental burdens associated with the manufacturing process, while Alabama's citizens get the benefit of the finished products. See, e.g., AISI Br. 18-19 (discussing plight of Georgia metal plating company that generates hazardous waste in the process of producing products for use by an Alabama business). Similarly, it is more than a little ironic that although a company located in Alabama manufactured half of

the PCBs ever produced in the United States (Tr. 167 (testimony of Rodger Henson)) and shipped them in interstate commerce to other states, Alabama has persistently tried to prevent the disposal within the State of material contaminated with those same PCBs. See page 9, *supra*. The fundamental error of the decision below is its failure to recognize that waste, like every other article of commerce, may not be subjected to differential treatment on the ground that it is a product of Alabama or New York or California; all must be treated as products of the Nation.

Finally, as the United States pointed out in its amicus brief at the petition stage (at 11), the State's concerns may be presented to Congress as justification for national legislation regarding hazardous waste disposal. Congress already has provided the states with incentives to begin the process of siting additional hazardous waste disposal facilities. See 42 U.S.C. § 9604(c)(9), discussed in *National Solid Wastes Management Ass'n v. Alabama Dep't of Environmental Management*, 910 F.2d at 716-717, 720. And Congress now is considering a range of options for addressing waste disposal issues, several of which would authorize the states to engage in disparate treatment of out-of-state hazardous waste. See Brief for National Solid Wastes Management Association as Amicus Curiae in Support of Petitioner at 29-30, *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, No. 91-636 (filed Feb. 14, 1992). Indeed, an ADEM official has appeared before Congress to testify in support of such legislation. See *Interstate Transportation of Solid Waste: Hearings Before the Subcomm. on Transportation and Hazardous Materials of the House Energy and Com-*

merce Comm., 102d Cong., 1st Sess. 101-143 (1991) (statement and testimony of Sue Robertson).

Alabama is not free to jump the gun, however. Unless and until Congress expressly authorizes disparate treatment, Alabama may not discriminate against out-of-state waste on the basis of its origin.

C. This Case Should Be Remanded To Allow The Alabama Courts To Address CWM's Entitlement To Retropective And Ancillary Relief.

For the foregoing reasons, the \$72 Additional Fee plainly violates the Commerce Clause. Alabama accordingly may not continue to enforce that levy and the state supreme court's determination that the tax is constitutional should be reversed. In addition, the case should be remanded to the lower court for consideration of CWM's claims for retrospective and ancillary relief. Cf. *Tyler Pipe Indus., Inc. v. Washington State Dep't of Rev.*, 483 U.S. 232, 251-253 (1987).

First, under *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990), Alabama must provide "meaningful backward-looking relief" to rectify the unconstitutional discrimination. *Id.* at 2247.²³ Although the Court has indicated that this requirement may be satisfied by either a refund or retroactive taxation of the favored class (see *id.* at 2252), it has cautioned that "retroactive imposition of a significant tax burden may be 'so harsh and oppressive as to transgress the constitutional limita-

²³ Because the invalidity of the Additional Fee is clear under long-settled constitutional principles, Alabama cannot argue that this Court's decision should apply only prospectively. *McKesson*, 110 S. Ct. at 2247 n.15.

tion,' depending on 'the nature of the tax and the circumstances in which it is laid.'" *Id.* at 2252 n.23 (citation omitted). Given the time that has elapsed since the Additional Fee took effect, any retroactive tax would violate due process in the circumstances presented here. In addition, in view of the fact that the tax is imposed on the operator of the facility, not the waste generator, and that CWM might not be able to pass on to its in-state customers the economic burden that was borne by CWM's out-of-state customers, any retroactive tax would "still in fact treat[] [out-of-state waste generators] worse than [generators of in-state waste] * * *, thereby perpetuating the Commerce Clause violation during the contested tax period." *Id.* at 2253.²⁴ Retroactive taxation accordingly is not a permissible retrospective remedy.

Second, a complete backward-looking remedy must address the effect of the discriminatory Additional Fee on the companion provision of Act No. 90-326 imposing a "cap" on the amount of waste that may be disposed of annually at the Emelle facility. The trial court correctly found in this case that the benchmark period for determining the volume limitation under the Cap Provision was tainted by the unconstitutional Additional Fee—the fee depressed receipts of out-of-state waste and therefore produced a lower volume limitation. See page 15, *supra*. See also Pet. 29 (discussing the impact of the Additional Fee

²⁴ Moreover, because of the potential inability of CWM to pass any retroactive tax through to its in-state customers, choice of that remedy would have the improper effect of penalizing CWM for seeking to vindicate its Commerce Clause rights by challenging the discriminatory Additional Fee.

on business at the Emelle facility). Indeed, that was Alabama's express purpose.²⁵

Courts have broad power to shape equitable relief to remedy fully the harm caused by a constitutional violation. *Milliken v. Bradley*, 433 U.S. 267, 281-282 (1977); *Lemon v. Kurtzman*, 411 U.S. 192, 200-201 (1973) (plurality opinion). As the United States concluded in its amicus brief at the petition stage (at 19), "[a] complete remedy for the effects of the impermissible Additional Fee should accordingly include some adjustment of the Cap Provision."²⁶

²⁵ As Governor Hunt stated:

When this bill was debated, some in the hazardous waste business warned that this would dramatically reduce dumping in Alabama. Good! That's what we want to do * * *. And if it is reduced, we're going to make sure it stays that way. An important provision in this bill will cap the amount of waste that can be dumped in Alabama at whatever amount is brought to the State over the next 12 months. In other words, if the new law cuts dumping from 800,000 tons to 100,000 tons, then that's going to be the limit on dumping in Alabama.

J.A. 66-67.

²⁶ This Court denied certiorari on the merits of the Commerce Clause challenge to the Cap Provision. But the Court's decision to let stand the lower courts' conclusion that the Cap Provision does not itself violate the Commerce Clause, like the lower courts' rulings themselves, plainly does not prevent the Alabama courts from adjusting the cap to provide a complete remedy for the discrimination effected by the Additional Fee.

CONCLUSION

The judgment of the Supreme Court of Alabama should be reversed.

Respectfully submitted.

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MARCH 1992

APR 9 1992

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC.,
Petitioner,
v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA;
ALABAMA DEPARTMENT OF REVENUE; and
JAMES M. SIZEMORE, JR., COMMISSIONER OF THE
ALABAMA DEPARTMENT OF REVENUE,
Respondents.

On Writ of Certiorari to the
Supreme Court of Alabama

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QUESTIONS PRESENTED

1. Whether Alabama may control the importation into the State of hazardous waste which endangers the health and safety of the State's citizens and the integrity of its environment.

2. Where the health and safety of Alabama's citizens, and its environment, are placed at risk by the landfilling of hazardous waste at Petitioner's commercial facility (which receives 85% to 90% of its hazardous waste from out-of-state), does the Commerce Clause prohibit Alabama from limiting the health, safety and environmental risks by imposing a disincentive in the form of a \$72 per ton disposal fee upon imported hazardous waste while providing for the regulated disposal within the State of the State's own such waste.

RULE 29.1 STATEMENT

All parties to this case in the Court below are listed in the caption.

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BRIEF FOR THE RESPONDENTS

STATEMENT OF THE CASE

A. The Substances Permanently Buried at Petitioner's Emelle, Alabama Facility Pose Serious Threats to Human Health and the Environment.

The hazardous wastes permanently buried at Emelle include "substances that are inherently dangerous to human health and safety and to the environment." Pet. App. 58a-59a. The Environmental Protection Agency (EPA) has identified 455 chemicals and substances as hazardous. J.A. 15-16. The Emelle facility is permitted to manage virtually all these chemicals and substances. *Id.* In addition, it is permitted to manage PCB's (polychlorinated biphenyls) and CERCLA waste, which encompasses even a wider range of chemicals under "the Clean Water Act or Air Act." *Id.*

These wastes are reactive, with ignition and explosion potential, and are toxic, carcinogenic, mutagenic, and damaging to human life and health. *Id.* The lower courts found these hazardous wastes consist of "ignitable, corrosive, toxic and reactive wastes which contain poisonous and cancer causing chemicals and which can cause birth defects, genetic damage, blindness, crippling and death." Pet. App. 59a. Studies confirm that when these substances get into the groundwater they cause cancer, malformed babies, miscarriages, and other deleterious health consequences. J.A. 16. Among the chemicals permanently buried at Emelle are arsenic, mercury, lead, cadmium, chromium and cyanide. Pet. App. 59a; J.A. 17. These metals are highly soluble in water and quickly move into the water table when presented with the opportunity. J.A. 17. The trial court found that "should a sudden or non-sudden discharge or release occur, hazardous wastes could pollute the environment, contaminate drinking water supplies, contaminate the groundwater and enter the food chain." Pet. App. 59a.

Despite treatment, many of the substances at Emelle will remain hazardous forever, Pet. App. 59a, and the

landfill will require monitoring and superintendence in perpetuity. Pet. App. 61a; J.A. 10-11, 138.

B. Emelle Is the Largest Hazardous Waste Landfill in the Country, and the Volumes of Waste Landfilled There Substantially Increased in the Years Preceding Act No. 90-326.

The Emelle facility was opened in 1977 and was acquired by Petitioner in 1978. R.T. 4; Def. Ex. 40, p. 2. The facility encompasses 2,700 acres. J.A. 12-13. Petitioner admits Emelle is the largest hazardous waste facility in the country; Rodger Henson, Petitioner's Vice President of Operations for the Southern Region, testified that he was not aware of any larger operation in the world. J.A. 12.

The volumes of hazardous waste buried annually at Emelle increased dramatically from 1985 to 1989, although it decreased after Act No. 90-326 went into effect on July 15, 1990:

1985	341,000 tons
1986	456,000 tons
1987	564,000 tons
1988	549,000 tons
1989	791,000 tons
1990	648,000 tons
1991	290,000 tons ¹

J.A. 23, and *EI Digest* 24, March 1992.

¹ While the total volumes of hazardous waste shipped to Emelle has declined since the Act's passage, *the percentage of out-of-state waste has remained the same*. Prior to enactment of the Act, 85 to 90% of the hazardous waste buried at Emelle was from out of state waste. Pet. App. 58a. From July 15, 1990 through December, 1991 the amount of out of state hazardous waste was 89% of the total. Ala. Dept. of Rev. Press Release, "U.S. Supreme Court to Hear State/Chem Waste Case," March 30, 1992; *The Montgomery Advertiser*, "High Court to Consider Extra Tax on Tainted Waste," March 31, 1992, p. 5A. The "Base Fee" applying to all waste was also increased by Act No. 90-326, to \$25.60 per ton from \$15.60 per ton. See Ala. Act No. 89-787 (former Ala. Code § 22-30B-2(a)).

In the five year period from 1985-1989 immediately preceding adoption of Act 90-326, the annual tonnage of hazardous waste permanently landfilled at Emelle increased 232%.

In 1989, approximately 40,000 truckloads of hazardous waste were delivered to Emelle. Pet. App. 62a. Petitioner was operating around the clock and trucks were backed up from the facility out onto the highway.² *Id.* The increased volumes have impaired the Alabama Department of Environmental Management's (ADEM) ability to monitor and perform its regulatory functions. J.A. 23-24.

Petitioner estimates Emelle has capacity for *another 100 years of operation*, and if left unrestricted the disposal volumes will increase annually. J.A. 9.³

C. While Hazardous Waste Is Regulated, the Regulations Do Not Assure That Permanent Burial of Hazardous Waste Is Safe.

The deficiencies of current EPA regulations and the ongoing dangers of hazardous waste disposal are highlighted by the General Accounting Office's (GAO) find-

² Bill Brock, Director of the Alabama Emergency Management Agency, the agency with responsibility for any emergency situation in the state, testified there were in excess of 100 trucks entering the facility some days, which impacted the roadways in the area. J.A. 39. Petitioner acknowledged that it handled 350 trucks in one day. J.A. 137.

³ Another CWM witness testified the industry expects the amount of hazardous waste generated will decrease as more pressure is put on industry and better technology is developed. J.A. 131. However, a survey of U.S. and Canadian insurance actuaries showed "the actuaries believe chemical wastes will pose the greatest threat to public health and generate the greatest environmental cost to society by the turn of the century." Note, "Constitutionally Mandated Southern Hospitality: *National Solid Wastes Management Association and Chemical Waste Management, Inc. v. Alabama Department of Environmental Management*," 69 N. Car. L. Rev. 1001, 1022 n.143 (1991), citing 20 Env't Rep. (BNA) 539-40 (July 14, 1989).

ings in a June 1990 report to Congress.⁴ J.A. 68-90; Def. Ex. 4; R.T. 232.

The GAO report notes, "As evidenced by the events at Love Canal, Times Beach, and thousands of other sites contaminated by hazardous wastes, land disposal of these wastes presents a significant threat to human health and the environment." J.A. 75.⁵ GAO determined:

The long-term effectiveness of current land disposal practices in controlling the migration of hazardous waste is not known, but EPA and others believe it is likely that some of the permitted hazardous waste disposal facilities will release hazardous substances into the environment at some period after they close. . . . Although EPA is aware of the potential for releases, it has not developed a strategy for addressing long-term postclosure concerns.

J.A. 71.

Even though EPA enacted regulations governing the disposal of hazardous waste, GAO found "[l]ittle experience-based data exist . . . on the long-term performance of these technology requirements in preventing waste migration . . . EPA and others believe that permanent containment of wastes is not possible" J.A. 72.⁶ Based on these findings, GAO concluded that "land disposal of these [hazardous] wastes presents a significant threat to human health and the environment," and "the magnitude of post-closure liabilities that could be incurred simply cannot be measured at this time." J.A. 75, 81. EPA's

⁴ GAO/RCED-90-64, "HAZARDOUS WASTE, Funding of Postclosure Liabilities Remains Uncertain" (June 1990) (Def. Ex. 4).

⁵ GAO noted that despite the dangers, extensive hazardous waste landfilling is occurring. "Although past land disposal of hazardous waste has resulted in major environmental contamination and serious health effects, land disposal of these wastes continues. About 13 million metric tons of hazardous waste is disposed each year." J.A. 70.

⁶ "EPA's position was, and still is, that absolute prevention of migration forever, or for the long term, is beyond the current technical state of the art." J.A. 83.

Science Advisory Board "determined that it is difficult to predict that improved land disposal will be protective of human health and the environment for the long-term." Def. Ex. 4 at 24; R.T. 232.

The following extract from that 1990 GAO report underscores the leakage problem already found to exist at the Emelle facility, as well as the seriousness of the long-term problems:

University researchers we talked with also said that problems may exist with a long-term effectiveness of current waste containment technology. *One researcher said that there is little doubt that current hazardous waste facilities will leak.* He said that present research shows that *these systems will fail at some point, particularly after post-closure care ends*, and that *he views today's disposal of hazardous waste as merely a storage mechanism for hazardous waste that may have to be removed eventually.* Another university researcher told us that the technology used today is the best available but that it is simply unknown if it will keep wastes in place.

J.A. 84 (emphasis added).

At Emelle, the hazardous waste is buried in trenches cut into a formation called the Selma Chalk. The trenches are cut deep and the new ones contain double synthetic liners. R.T. 28-29. When filled, the trenches are closed, covered and resodded. Hanley dep. Vol. II, at 115. Underlying the Emelle facility is a 700 foot thick formation of fractured chalk. J.A. 29-31. Under the chalk is the Eutaw aquifer, a source of fresh water. Pet. App. 60a.

The risk of hazardous waste migration lies both in the leakage of the hazardous waste and the leakage of a poisonous leachate, which forms when rainwater and groundwater seep into the open or closed trenches. Pet. App. 59a. It is impossible to prevent leachate formation. J.A. 148.

Petitioner pumps the leachate from the trenches, stores it in storage tanks, and then ships it to an aqueous stor-

age facility in Texas. J.A. 132. The storage tanks hold 5 million gallons of leachate. With the current landfilled volumes, Petitioner pumps 10-15 million gallons of leachate from the trenches annually. J.A. 129. Obviously, this amount will increase as more waste is imported. Currently, there are 70 monitoring wells. J.A. 9-11. These wells must be monitored forever. *Id.* As more trenches are added, more wells will be installed.⁷ Petitioner employs four chemists and technicians who spend half their time monitoring leachate. J.A. 129. The annual cost to Petitioner of monitoring leachate is \$100,000-\$150,000 per year, and the annual cost of gathering, collecting, storing, transporting and disposing of the leachate *at current volumes* is \$2 to \$3 million per year. J.A. 129. The security, maintenance, monitoring and disposal of leachate is required *forever*. J.A. 10-11. Petitioner has this responsibility under federal law for 30 years after closure of the site, but thereafter, the State of Alabama will bear this expense in perpetuity. *Id.*

Although some of the wastes will remain hazardous forever, Petitioner admits it does not know how long the trench liners will last. J.A. 127. Petitioner's expert witness and long-time consultant, William Brumund, testified the liners would only retard migration for the short term, measured in tens of years. Pet. App. 60a. In fact, in 1983 a consultant to Petitioner, Golder Associates, reported to Petitioner that the water pressure in the trenches would eventually cause leakage of fluid from the trenches into the surrounding chalk. Pet. App. 59a. Because the liners will not last indefinitely, Petitioner is relying upon the Selma Chalk to stop the mitigation of hazardous waste. J.A. 127. However, as the chalk has faults and fractures which conduct fluids, it is significant that some of the older trenches at Emelle are *already* leaking leachate. Pet. App. 59a. Former Alabama state Geologist Tom Joiner testified that leachate

⁷ The wells themselves, since they penetrate into the Selma Chalk, create new conduits for hazardous waste to reach the underlying groundwater. Pet. App. 61a.

has moved out of the trenches at Emelle, and the flow is moving into the Selma Chalk. J.A. 43.

Furthermore, there are faults and joints (cracks) in the Selma Chalk that are known geologically "to be commonly capable of transmitting water", and thus, leachate. J.A. 29. Dr. Richard Groshong, a geologist, performed a study of the faults in the Selma Chalk and found "considerable evidence" that at least some of the faults are transmitting water now. J.A. 29-30.⁸ Dr. Groshong testified that it is unknown if the faults go all the way down to the Eutaw aquifer underlying the Emelle facility, but it is "perfectly possible" that they do. *Id.*⁹ Finally, Dr. Groshong testified the faults and fractures in the Selma Chalk have not been properly mapped and that aerial photographs confirm faults in the trenches at Emelle. J.A. 31.

Leakage of leachate from the Emelle trenches occurs in two ways. Leachate can leak downward into the Selma Chalk. Pet. App. 12a. A second, equally serious, concern is lateral migration close to the surface of the trenches. Emelle is located in a drainage basin of the Tombigbee and Noxubee Rivers, which are major sources of fresh water to the State of Alabama. Pet. App. 60a. Leachate can flow laterally down the natural drainage gradient into the tributaries of the Tombigbee and Noxubee. *Id.*

Petitioner's expert witness Brumund testified that leachate will continue to be generated at the facility. J.A. 148. Joiner further testified that the facility will have to be monitored, with regulatory surveillance and

⁸ Dr. Groshong found that the chalk was "chemically etched," indicating conduits for water, and is "significantly stained with iron" which is evidence of water leaking through the chalk. J.A. 30.

⁹ Time estimates of the speed at which leachate will penetrate through the chalk to the underlying Eutaw aquifer are greatly variable. EPA estimates ranged upward from 330 years, with CWM estimating 10,000 years. Pet. App. 60a. Nonetheless, faults and fractures greatly accelerate travel time through the chalk and, as noted above, some faults and fractures may extend down to the Eutaw aquifer. Pet. App. 61.

maintenance *forever*, and the grounds protected against future erosion. J.A. 47, 49.¹⁰

There have been spills, release of emissions and trucking accidents at Emelle. J.A. 20-22. Emelle is in an earthquake zone, yet Petitioner has no contingency plans in the event of an earthquake. J.A. 19, 40.¹¹

D. Current Financial Assurance Requirements Are Inadequate To Protect Against the Perpetual Risks.

As to protecting against future liabilities, GAO noted "the magnitude of postclosure liabilities . . . simply cannot be measured at this time." J.A. 81. Similarly, Bernard Webb, an insurance specialist, testified that very little is known about the effectiveness of the technology for hazardous waste landfilling¹² and "insurance is for practical purposes almost unavailable." J.A. 115. He testified given the scope of Emelle, for Alabama's purposes insurance is not "available in amounts adequate for the risk." J.A. 116. Webb estimated that the State of Alabama would need an insurance policy with limits of \$1 billion to insure it against the risks of Emelle. J.A. 123. The premium for such a policy would run from \$150 million a year, J.A. 124, and there is no such policy

¹⁰ Joiner's exact testimony concerning the perpetual monitoring and superintendence was as follows:

You know it's one thing to think 30 years and something else to think 100 years; but when you think about it's going to be there as long as this State is here, then that puts another perspective on it.

J.A. 49.

¹¹ There was an earthquake in Sumter County, Alabama wherein Emelle is situated in 1886 which caused a one-half foot to one foot vertical ground movement. J.A. 126. Joiner testified that the past earthquake is significant because it is reasonably certain to happen again and that it would not take a major earthquake to crack the materials that seal some of the faults and allow new avenues for the leakage of hazardous waste. J.A. 48-50.

¹² Hanley of CWM testified, "The industry is only 10 years old and people are continuing to learn about leachate and water pressures and secondaries. There is no definite answer." J.A. 140.

available, J.A. 121. He estimated that if the Eutaw aquifer was contaminated the cost would be virtually incalculable, in the billions of dollars. J.A. 118.¹³

GAO noted "[p]rivate sector options for funding postclosure liabilities include private insurance, coinsurance, reinsurance, and voluntary risk pooling." J.A. 87. GAO found that "[b]ecause of the unknown liabilities and perceived risk associated with hazardous waste disposal facilities after they close, these postclosure funding mechanisms are currently not viable options." *Id.*¹⁴

Congress has recognized the potential unlimited liability for hazardous waste sites. In enacting the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9675, Congress established a \$200 million Post Closure Liability Trust Fund (PCLTF) to assume liabilities at permitted hazardous waste disposal facilities after closure.¹⁵ J.A. 77. However, Congress became concerned that the fund would not have sufficient resources to pay the magnitude of liabilities that would be incurred. J.A. 78. Accord-

¹³ Mr. Webb estimated that in the highly unlikely event of a tornado striking the PCB tanks at Emelle, the remedial cost would range from \$126 million to \$1.9 billion. J.A. 118. While also highly unlikely, if a truck carrying PCB's crashed into the adjoining river, the remedial cost would be from \$10-\$99 million. *Id.*

¹⁴ The unavailability of insurance is due in part to "[t]he inability to measure or quantify the liability exposure at hazardous waste facilities along with a perception by the insurance industry that liabilities are *certain to occur after these facilities close*." J.A. 88 (emphasis added).

Similarly, risk pools are "not a viable option for postclosure liability funding." J.A. 89. "Because postclosure liability is uncertain and potentially unlimited, Treasury determined that underwriting the risk of postclosure is no more acceptable to mutual associations than to individual insurance companies." J.A. 89.

¹⁵ After transfer of liability, the fund, generated from a tax on disposed hazardous waste, would pay for monitoring and maintenance beyond the 30-year postclosure period and for damages, such as groundwater contamination and necessary clean up operations. 42 U.S.C. § 9641.

ingly, in enacting the later SARA amendments Congress suspended the transfer of liability to the PCLTF and abolished the fund. J.A. 78; Pub. L. 99-499, § 201.

As GAO noted, "Postclosure financial assurance is currently required by EPA only for 30-year maintenance and monitoring as well as identified corrective action costs." J.A. 86. However, there is no financial assurance "for potential but unknown postclosure liabilities such as on-site cleanup or off-site damage." *Id.* EPA does not require funds to be set aside for these contingencies. *Id.* Nor is there any long term assurance owner-operators will or can provide remediation: "No one can predict what the future financial situation of any owner operator will be in the long-term with any certainty, and if an owner operator were to become bankrupt or otherwise go out of business, there is little likelihood that funding would be available for unanticipated postclosure costs." J.A. 86.

Thirty years after closure Alabama will have the financial burden of maintaining these expensive monitoring systems in *perpetuity*. The trial court found:

... Although it will be necessary to monitor, regulate, maintain (including the pumping, collection, storage, transportation and disposal of leachate from the trenches), and secure the facility forever, Petitioner has made no provision for the payment of such costs beyond a period of 30 years after closure. Additionally, there has been no provision for the payment of any abatement, corrective, or remediation costs, compliance monitoring, third-party damages or natural resource damage.

... Whenever Petitioner's planned or unplanned cessation of activities at Emelle occurs, there will be substantial financial and environmental risks to the people, businesses, and corporations of Alabama.

Pet. App. 62a-63a.

E. The Act Is Consistent With Federal Policy.

In the 1984 amendments to the Resource Conservation and Recovery Act (RCRA), Congress declared its policy that "whenever feasible the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible." 42 U.S.C. § 6902(b). Moreover, Congress has expressed a preference against the landfilling of hazardous waste.¹⁶ Mr. Henson of Petitioner testified that as a result of the Additional Fee, less volume of hazardous waste is shipped to Emelle, and there are "probably some waste minimization programs underway." J.A. 128.

Further, in the Superfund Amendments and Reauthorization Act (SARA), Pub. L. 99-499, amending scattered sections of 42 U.S.C. §§ 9601-9675 (Supp. IV 1986), Congress required each state to demonstrate capacity to dispose of its hazardous waste for the next twenty years by disposal in in-state facilities or by agreements with other states. Petitioner's expert witness Brumund testified a hazardous waste disposal site could be engineered in each state in the nation. J.A. 143.¹⁷

The trial court found, "Although waste landfills can be designed and engineered to operate in practically every state of the United States, only a very few commercial sites presently exist. Efforts to obtain permits for new sites in other states are resisted by citizens of those states." Pet. App. 57a. This local opposition to new sites is called the "not-in-my-backyard" syndrome (NIMBY). "[O]nly one additional hazardous waste landfill has been

¹⁶ In the Congressional findings accompanying the 1983 amendments to RCRA, Congress found that "reliance on land disposal should be minimized or eliminated and land disposal, particularly landfill and surface impoundments, should be the least-favored method of managing hazardous wastes. . . ." 42 U.S.C. § 6901(b)(7).

¹⁷ Currently in the United States, there are only 21 hazardous waste commercial landfills located in sixteen states. Smith, "Hazardous Waste Landfill Facility Information," *EI Digest*, at 26-27 (Table I) (March 1992). Most of these facilities are much smaller than the Emelle landfill. *Id.*

permitted in the United States since the effective date of RCRA, November 17, 1980". Pet. App. 57a.¹⁸

A recent development since the decision of the Alabama Supreme Court is the adoption of a resolution by the National Governors Association (NGA) in response to the NIMBY effect on the hazardous waste problem. The NGA adopted a policy encouraging a "fee-based" approach to the regulation of interstate movement of hazardous waste. National Governors Association, Policy Positions, "D-17, Hazardous Waste Management, § 17.8 Interstate Shipments of Hazardous Waste," (1991-92); NGA, RCRA Reauthorization Subcommittee State/EPA Committee Report, "Recommendation for Reducing the Tensions Associated with the Interstate Movement of Subtitle C Wastes," September 13, 1991, at 1-3. The new policy endorses a differential fee between the disposal of in-state and out-of-state hazardous waste. The policy would allow an importing state to levy a "host state fee" on hazardous waste "imported for management." *Id.* The differential, or host, fee would be "phased-in over time and capped as a multiple of the state's existing in-state fee" (or exporting state's fee, if higher).¹⁹

¹⁸ The SARA capacity assurance requirements were enacted in response to NIMBY:

Unfortunately . . . Congress failed to anticipate the intensity of public opposition to new and expanded waste management facilities. While everyone wants hazardous waste managed safely, hardly anyone wishes it managed near them. This is the NIMBY syndrome. Yet if RCRA and Superfund programs are to work—public health and the environment are to be protected—the necessary sites must be made available.

132 *Cong. Rec.* § 14924 (Oct. 3, 1986) (Remarks of Senator Chafee). See generally Delogu, "NIMBY" as a National Environmental Problem, 35 S. Dak. L. Rev. 198 (1990).

¹⁹ The purpose of the differential fee is:

This fee would accomplish two objectives: It would compensate importing states for the costs and environmental risks they bear as hosts to these facilities; and it would provide an additional

Id. at 1. The policy calls for a 4-1 differential in the fees charged for out-of-state and in-state hazardous waste landfilling. *Id.* Attachment A. The differential under the Alabama Act is less than 3 to 1, well within 4-1 differential recommended by the NGA.

SUMMARY OF ARGUMENT

Whether the "commerce" in this case is in hazardous waste, or waste disposal services or in landfill space, the actual thing being bought and sold is a *transfer of risk*. Public health dangers, and the risk of potentially catastrophic environmental damage, are transferred to Alabama *in perpetuity*, and avoided by those in other states who pay to have this risk transferred. Petitioner is selling the risk of pollution of the Eutaw aquifer, to those in other states whose groundwater will remain uncontaminated because they sent their wastes to Alabama. Petitioner is selling the risk of lateral seepage of leachate into the tributaries of the Tombigbee River, to those whose rivers may remain unspoiled because they sent their waste to Alabama. Petitioner is selling the future health of Alabama citizens, and the future integrity of Alabama's environment, to those in other states who will never have to face the social consequences. Certainly those who drafted the Commerce Clause did not

economic incentive for generators to either reduce their waste generation or create *in-state* management options.

Id.

Both options are in accord with Congressional policy in RCRA and SARA to discourage landfilling of hazardous waste and for each state to provide capacity assurance.

This burden was expressly recognized in the findings by the Alabama Legislature that:

As the site for the ultimate burial of hazardous wastes and substances, the state incurs a permanent risk to the health of its people and the maintenance of its natural resources that is avoided by other states which ship their wastes to Alabama for disposal.

Ala. Act No. 90-326, § 1(d); Ala. Code § 22-30B-1(d); Pet. App. 103a.

envisage that they were creating a right to engage in unfettered interstate "commerce" of this nature.

The differential fee structure adopted by the Alabama legislature serves a legitimate purpose of accepting the State's responsibility for managing its own dangerous waste, while protecting its citizens and environment from the risks caused by the shipment into the State of uncontrolled volumes of additional dangerous wastes. This purpose cannot be adequately served by any available nondiscriminatory alternative.

Absent preemption by Congress, states may, under their police powers, control the movement into the State of articles which endanger the public health or safety or the integrity of the state's environment. This power has been consistently recognized by this Court, from Chief Justice Marshall's early comments on the subject in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), through the recent decision in *Maine v. Taylor*, 477 U.S. 131 (1986). This Court's decisions make clear that this power is not diminished by the fact that the state may provide for the regulated management or disposal of similarly dangerous items occurring within the state. States may require dangerous articles already in the state to be managed or disposed of as necessary to control and minimize the dangers of those articles, while controlling the movement of similarly dangerous articles into the state.²⁰

This state power has been so universally understood and so well-settled by this Court's decisions that, in the context of articles which are in fact dangerous, no credible argument to the contrary could have been imagined prior to 1978. And it remains clear that this traditional framework continues to govern state measures regulat-

²⁰ Petitioner, however, argues that where a problem already exists within a state, the state cannot control importation of more such problems because there is an available nondiscriminatory alternative—accept an unlimited quantity of more such problems on the same terms which the state employs to deal with the problems it already has.

ing every dangerous item *except* "waste."²¹ But since 1978, the waste disposal industry has seized on uncertainties surrounding *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), to attempt (with some success) to defeat state efforts designed to manage waste disposal for the protection of public health, safety and the environment.

The uncertainty in *Philadelphia v. New Jersey* is not centered on the legal standard applied. The uncertainty concerns the majority's understanding or conception of the *facts* to which the standard was being applied. Did the Court really hold that public health and environmental concerns were *irrelevant*? Or did the Court simply not accept the existence of what it referred to as "allegedly harmful effects"? 437 U.S. at 628. Did the Court really hold that New Jersey was compelled to accept the burden of importation of *dangerous* waste, *because* the State provided for disposal within the State of its own such waste? Or did the court refer to the fact that New Jersey allowed disposal of its own waste as evidence to support its conclusion that the garbage was not, in fact, dangerous?

The language of the opinion, *if merely read in isolation*, may be susceptible to the interpretation of the case advanced by Petitioner and the Solicitor General. However, when the case is considered within the framework of this Court's prior and subsequent decisions, it is clear that the construction of the case urged by Petitioner and the Solicitor General is inconsistent with principles which have been well established and universally recognized for over a century and a half.

²¹ The confusion surrounding *Philadelphia v. New Jersey* has, however, in at least one instance resulted in a court erroneously striking down a state law outside the waste context. The First Circuit incorrectly relied upon *Philadelphia v. New Jersey* to distinguish Maine's baitfish quarantine law from numerous indistinguishable measures designed to control the spread of animal diseases, which measures have been consistently upheld by this Court. *U.S. v. Taylor*, 752 F.2d 757, 761 (1st Cir. 1985), *rev'd sub nom. Maine v. Taylor*, 477 U.S. 131 (1986).

The majority opinion in *Philadelphia v. New Jersey* applies the correct rule of decision where the court rejects purported health, safety or environmental concerns and finds a state measure to involve simple economic protectionism. See, e.g. *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988). The dissent, however, expresses the correct rule of law where the court accepts that the state is in fact acting in response to legitimate concerns. See, e.g. *Maine v. Taylor*, 477 U.S. 131 (1986); see also cases cited *infra* n.23. The disagreement between the majority and minority in *Philadelphia v. New Jersey* appears to have been not on which legal standard to apply to a given set of facts, but rather a disagreement concerning the facts to which a standard was to be applied.

Hazardous waste landfills are not natural resources. They are man-made, engineered facilities which exist and operate because, and *only* because, the states in which they are located allow them to exist and operate. Hazardous waste is not hauled across the continent because of any value of commerce in the waste; this movement occurs due to the negative value, the dangers, of having such waste present. The fact that Alabama permits the Emelle facility to exist and operate to provide for the management of the State's *own* hazardous waste does not mean that Alabama is required to accept unlimited additional quantities of imported hazardous waste, or to allow Petitioner to leave the State holding the perpetual risk and burden of whatever unlimited quantities of hazardous waste Petitioner may wish to bury in Alabama.

The construction of the Commerce Clause urged upon this Court by Petitioner and its amici is inconsistent with this Court's numerous earlier decisions recognizing and upholding the power of the States to control the movement into the State of articles which endanger public health, safety or the environment. These cases are of significant modern-day relevance, forming the constitutional framework for numerous state regulatory measures. The reasoning of these cases and the principles applied are consistent with, and form the basis of, the currently-

employed Commerce Clause standard applied to state measures that discriminate against out of state articles on grounds of health, safety, or environmental dangers. This Court's decisions have not turned on a "different threat" or similar/dissimilar threat distinction. Under the standard which Petitioner urges the Court to adopt in this case, the only State that could continue to control the movement into the state of diseased livestock would be one whose cows never got sick.

Permitting any new hazardous waste disposal facility is a politically difficult undertaking for state and local officials. A holding by this Court that any such facility which is permitted must be allowed to import and leave the local community burdened with such additional hazardous waste as the operator of the facility may choose would make the permitting of any new commercial hazardous waste disposal facility a political impossibility. Any state would, understandably, be hesitant to allow the waste disposal industry to operate within the state under the rules Petitioner seeks to establish in this case.

ARGUMENT

ALABAMA'S FACIALLY DISCRIMINATORY FEE STRUCTURE, WHICH IMPOSES A \$72 PER TON ADDITIONAL FEE ON OUT-OF-STATE WASTE, DOES NOT VIOLATE THE COMMERCE CLAUSE

I. Alabama Has Legitimate Concerns About The Land-filling Of Large Volumes Of Imported Hazardous Waste.

The public health, safety and environmental dangers resulting from the activity which the challenged statute was designed to control are well-documented and uncontroverted in the record of this case. Any suggestion that current technology or regulations are adequate to control these dangers is refuted by the findings of Congress and the GAO, as well as by the facts established in this case.²²

²² Petitioner admits seven sanctions against it in the past by EPA for regulatory violations with respect to operations of the Emelle

As Congress has declared, "reliance on land disposal should be minimized or eliminated, and land disposal, *particularly landfill and surface impoundment*, should be the least favored method for managing hazardous wastes," because such facilities "*are not capable of assuring long-term containment of certain hazardous wastes, and to avoid substantial risk to human health and the environment.*" Resource Conservation and Recovery Act of 1976, as amended (RCRA) § 1002(b)(7), 42 U.S.C. § 6901(b)(7) (emphasis added).

The GAO reported to Congress in 1990 that current technology is inadequate to protect against the long-term risks of landfilling hazardous waste. J.A. 69-90. GAO found that "EPA and others believe that permanent containment of wastes *is not possible* and that *leakage will occur* at some time after the 30-year postclosure period." J.A. 72 (emphasis added).

As the Solicitor General acknowledged in his brief in support of certiorari,

"[t]he State of Alabama plainly has legitimate and well-founded concerns about the disposal of hazardous wastes at the Emelle Facility. The health, safety and

facility. Exhibit 20 & 20A to Rodger Henson's deposition, identified at pages 118-125. The deposition was offered (T.R. 572) and admitted (T.R. 573). There were 12 on-site spills at Emelle from 1989 to the October 1990 trial. J.A. 20-22. Petitioner has also recently admitted in a 10K filing with the United States Securities and Exchange Commission that it currently faces six potential government actions involving unnamed waste handling sites, each of which actions involve potential sanctions of more than \$100,000; and that it is under criminal investigation for possible procurement and environmental law violations in connection with cleanup work it did for the Army Corps of Engineers. *The Wall Street Journal*, April 2, 1992, at A4.

In addition, federal officials recently said that more than 750,000 pounds of dirt contaminated with small amounts of radioactive uranium from the federal nuclear weapons facility at Oak Ridge, Tennessee were believed to have been improperly sent to the hazardous-waste landfill at Emelle. *The Birmingham News/Post Herald*, February 15, 1992, at 1A.

welfare of its citizens in the area of the facility, the safety of travelers on the roads leading to the facility, and the future condition of the natural resources and the environment of the State are all potentially implicated by the disposal of hazardous wastes."

Brief for U.S. in support of petition at 8.

II. *Philadelphia v. New Jersey* Is Not Controlling In The Context Of Real And Substantial Health, Safety And Environmental Risks.

Petitioner, in effect, is asking this Court to establish as a rule of constitutional law the following:

If a state permits the disposal within its borders of its own noxious items which threaten public health, safety and the environment, then the state must also accept and allow disposal within the state, on the same terms, all such noxious items from all other states, regardless of the increased risk thereby created to the health and safety of citizens of the recipient state and to its environment.

Petitioner argues that such a rule follows from this Court's decision in *Philadelphia v. New Jersey*. Petitioner's construction of *Philadelphia v. New Jersey* would place that case in direct conflict with every relevant decision of this Court before and since that decision.

Philadelphia v. New Jersey should be interpreted, as the Supreme Court of Alabama interpreted the case, in a manner consistent with well-established law—as a case striking down a measure to protect in-state interests from out-of-state economic competition. Numerous decisions of this Court recognize the states' power to control importation of dangerous items.²³ Petitioner's only basis for

²³ See *Maine v. Taylor*, 477 U.S. 131 (1986). For other examples (hereinafter referred to collectively as "quarantine cases"), see *Clason v. Indiana*, 306 U.S. 442 (1939); *Mintz v. Baldwin*, 289 U.S. 346 (1933); *Oregon-Washington R. & Nav. Co. v. Washington*, 270 U.S. 87 (1926); *Sligh v. Kirkwood*, 237 U.S. 52 (1915); *Asbell v. Kansas*, 209 U.S. 251 (1908); *Crossman v. Lurman*, 192 U.S. 189 (1904); *Reid v. Colorado*, 187 U.S. 137 (1902); *Compagnie Fran-*

attempting to distinguish these cases is to argue that *Philadelphia v. New Jersey* held that a state's unquestioned power to control importation of such items somehow disappears merely because the state is already dealing with similarly dangerous items to a limited extent within the state.

It is not disputed that one ton of out-of-state waste is no more dangerous than one ton of *comparable* in-state hazardous waste.²⁴ But that is not determinative. It is also indisputable that the 788,000 total tons of hazardous waste buried by Petitioner at Emelle in 1989 present a considerably greater threat to Alabama than the 69,000 tons of Alabama-generated waste buried there that year. Even so, Petitioner unreasonably argues that the State loses its otherwise clear power to protect itself against overwhelming volumes of out-of-state dangerous waste

caise v. State Bd. of Health, Louisiana, 186 U.S. 380 (1902); *Smith v. St. Louis & Southwestern R. Co.*, 181 U.S. 248 (1901); *Rasmussen v. Idaho*, 181 U.S. 198 (1901); *Louisiana v. Texas*, 176 U.S. 1 (1899); *Missouri, Kansas, & Texas R. Co. v. Haber*, 169 U.S. 613 (1898); *Kimmish v. Ball*, 129 U.S. 217 (1889).

Other cases recognizing the State's power include *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Bowman v. Chicago & Northwestern R. Co.*, 125 U.S. 465 (1888); *Hannibal and St. Joseph R.R. Co. v. Husen*, 95 U.S. 465 (1878); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

²⁴ This assumes, of course, that the wastes are *comparable*. Out-of-state waste does, however, differ from in-state waste in one important respect. As discussed in the amicus brief submitted by the States of Ohio and Kentucky, states are unable to monitor out-of-state waste streams at their source, leaving the state with substantial uncertainty as to the hazardous constituents. Indeed, out-of-state waste often moves through brokers and even Petitioner is without knowledge of the source of the waste. Statement of George Vander Velde, Petitioner's Vice President of Science and Technology, to the Committee on Interior and Insular Affairs, U.S. House of Representatives, February 20, 1992. A copy of Mr. Vander Velde's written statement has been lodged with the Clerk of this Court. The dangers inherent in such uncertainty were recently emphasized by the discovery that Petitioner had illegally buried in Alabama some 750,000 pounds of low-level radioactive waste from government contractors. See *supra* n.22.

simply by being responsible enough to permit the regulated disposal within the State of its own such waste.

It is clear that the majority opinion in *Philadelphia v. New Jersey* considered New Jersey's ban on out-of-state garbage to amount to simple economic protectionism, protecting New Jersey residents from out-of-state competition for landfill space. This Court has consistently characterized *Philadelphia v. New Jersey* as a case involving economic protectionism, in contrast to environmental protection. For example, in *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456 (1981), this Court cited *Philadelphia v. New Jersey* as supplying the rule of decision where "a state law purporting to promote environmental purposes is in reality 'simple economic protectionism'." 449 U.S. at 471 (emphasis added).²⁵

In *Maine v. Taylor*, 477 U.S. 131 (1986), this Court cited *Philadelphia v. New Jersey* for the proposition that "[s]hielding in-state industries from out-of-state competition is almost never a legitimate local purpose, and state laws that amount to 'simple economic protectionism' consequently have been subject to a 'virtually per se rule of invalidity'" while, in contrast to *Philadelphia v. New Jersey*, "there is little reason in this case to believe that the legitimate justifications that the State has put forward for its statute are merely a sham or a 'post hoc rationalization'." *Maine v. Taylor*, 477 U.S. at 148-49.

Again, in *Maine v. Taylor*, this Court used *Philadelphia v. New Jersey* as an example of a case *in contrast* to cases "where, as in this case, out-of-state goods or services are particularly likely for some reason to threaten the health and safety of a State's citizens or the integrity

²⁵ Given the substantial increase since 1978 in the understanding of the health and environmental risks associated with the landfilling of solid waste such as that involved in *Philadelphia v. New Jersey*, that case might be decided differently today on a record establishing those risks. Such a record is unlikely to be developed so long as lower courts continue summarily to strike down responsible state and local efforts to manage waste disposal problems.

of its natural resources" to make the point that "[n]ot all intentional barriers to interstate trade are protectionist, however, and the Commerce Clause 'is not a guarantee of the right to import into a state whatever one may please, absent a prohibition by Congress, regardless of the effects of the importation upon the local community.'" *Maine v. Taylor*, 477 U.S. at 148 n.19 (quoting *Robertson v. California*, 328 U.S. 440, 458 (1946)).

The Supreme Court of Alabama correctly observed that this Court's decisions "make a distinction between state measures that discriminate arbitrarily against out-of-state commerce in order to give in-state interests a commercial advantage, i.e., simple economic protectionism, and state measures that seek to protect public health or safety or the environment," citing *Maine v. Taylor*, 477 U.S. at 148 n.19 (1986). Pet. App. 41a. Although this Court made exactly such a distinction in *Maine v. Taylor* (and numerous other decisions), Petitioner claims that this Court's decisions "expressly and conclusively reject the Alabama Supreme Court's 'distinction'." Brief for Petitioner at 26-27. To the contrary, as this Court has stated, "[t]his distinction between the power of the State to shelter its people from menaces to their health or safety. . . , even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law." *H. P. Hood & Sons v. Dumond*, 336 U.S. 525, 533 (1949). See also *Sporhase v. Nebraska*, 458 U.S. 941, 956 (1982) ("For Commerce Clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other.")

Contrary to Petitioner's interpretation of the case, *Philadelphia v. New Jersey* does not eliminate this fundamental distinction and elevate wastes to a level of constitutional protection unique among dangerous articles.

Philadelphia v. New Jersey merely holds that state measures discriminating against out-of-state waste are subject to the same review under the Commerce Clause as state measures discriminating against other out-of-state items. But Petitioner's argument leaps from the result in *Philadelphia v. New Jersey* to the conclusion that any state restriction on the importation of waste must be held invalid, without regard to whether the case involves legitimate health, safety, or environmental concerns, or merely simple economic protectionism.²⁶

The interpretation of the Commerce Clause advanced by Petitioner simply cannot be reconciled with this Court's decision in *Maine v. Taylor* and numerous earlier decisions of this Court recognizing the power of the states to regulate the importation in interstate commerce of items which pose threats to the health, safety or environment of the state.²⁷ It is illogical to assert that while the Commerce Clause allows a state to restrict the importation of baitfish on the grounds that some of the imported baitfish *might* cause some disturbance in the aquatic ecology, the Commerce Clause requires states to suffer the importation of unlimited volumes of hazardous wastes. These wastes, without dispute, "are inherently dangerous to human health and safety and to the environment" and consist of "wastes which contain poisonous and cancer causing chemicals and which can cause birth defects,

²⁶ This Court rejected New Jersey's argument that its ban on out-of-state garbage was analogous to health-protective measures which this Court had repeatedly upheld, distinguishing the quarantine cases as involving restrictions on articles whose "very movement risked contagion and other evils," from the ordinary garbage where there was "no claim here that the very movement of waste into or through New Jersey endangers health." *Philadelphia v. New Jersey*, 437 U.S. at 628-29. In contrast, the trial court in this case found that "[t]he hazardous wastes landfilled at the Emelle facility are inherently dangerous in their transportation and movement into or from one place to another throughout the State of Alabama." Pet. App. 62a.

²⁷ See cases cited *supra* n.23.

genetic damage, blindness, crippling and death." Pet. App. 11a.

The Commerce Clause "does not elevate free trade above all other values." *Maine v. Taylor*, 477 U.S. at 151. The Commerce Clause places the value of free trade in goods above a state's parochial interest in protecting or favoring its own local producers; it does not place the "value" of "free trade" in poisonous waste materials which cause cancer, birth defects, genetic damage, blindness, crippling and death, for the purpose of burying such materials in the ground,²⁸ above the state's responsibility for protecting the health and safety of its citizens and the integrity of its environment. Alabama has a reason, apart from the origin of the wastes, to control importation of the wastes—they are wastes which are "inherently dangerous to human health and safety and to the environment." Pet. App. 11a.

III. Alabama's Differential Fee Structure, As A Measure To Control The Movement Into The State Of Dangerous Waste Materials, Is A Valid Exercise Of The State's Police Power Under *Maine v. Taylor* And The Older Quarantine Cases.

A. On the Basis of the Health, Safety, and Environmental Dangers Documented in This Case, Alabama May Control the Movement of Hazardous Waste Into the State, While Providing for Regulated Disposal Within the State of Its Own Waste.

Under the principles established in the quarantine cases and reaffirmed in *Maine v. Taylor*, Alabama may control the movement of dangerous waste into the state, just as Alabama and other states control the importation of other dangerous items.²⁹ Petitioner and its amici

²⁸ Due to the significant public health and environmental dangers created by land disposal of hazardous wastes, Congress has declared that such disposal "should be the least favored method for managing hazardous wastes." 42 U.S.C. § 6901(b) (7).

²⁹ This Court's earlier cases recognizing the power of the states to control movement of dangerous articles into the state are not

argue, however, that the rationale of the quarantine cases does not apply, asserting that the states in those cases also "banned" the equivalent in-state dangerous items. As expressed by the Solicitor General, "Alabama's Additional Fee is not a quarantine statute because Alabama does not preclude the disposal of hazardous waste that is generated within its borders." Brief of U.S. at 25; see also Brief for Petitioner at 31 n.21. It is not clear just what Petitioner or the Solicitor General think the states in these cases did (or still do) about their own diseased livestock, animal carcasses or other noxious items, but it is unlikely that those states dealt with the problems by commanding, for example, that cows not get sick or die within the state. These States required (and states still generally require) that dangerous items within the state be *disposed of*, or managed, in accordance with the state's regulatory requirements, just as Alabama requires that its own hazardous waste be disposed of or managed in accordance with Alabama's regulatory requirements.

Indeed, this is clearly shown by *Clason v. Indiana*, 306 U.S. 439 (1939). The Solicitor General erroneously characterizes *Clason* as "rejecting [a] Commerce Clause challenge to [a] statute restricting transport of dead animals, noting that the State has a similar scheme respecting in-state carcasses." Brief of U.S. at 24 (emphasis added). In fact, Mr. Clason was convicted by Indiana of transporting what was apparently an *in-state* dead horse *out* of that State to Illinois. 306 U.S. at 440. *Clason* did not note "that the State has a similar scheme respecting in-state carcasses"; the entire case involved the application of that in-state scheme, which required and regulated

relics of the past with no modern relevance. These cases establish the constitutional framework within which states control health, safety and environmental risks by controlling the importation of dangerous articles. See, e.g., *Mendicoa v. Wyoming*, 780 P.2d 1346 (Wyo. 1989) (cattle); *Winkler v. Colorado Dep't of Health*, 193 Colo. 170, 564 P.2d 107 (1977) (pets for commercial sale); *Wyant v. Figy*, 340 Mich. 602, 66 N.W.2d 240 (1954) (bees); *State v. Lovelace*, 228 N.C. 186, 45 S.E. 2d 48 (1947) (cattle).

disposal, within Indiana, of in-state items of a type which the State unquestionably could prohibit from being brought into the State.

Although not an issue in the case, both the Indiana Supreme Court and this Court recognized that the State plainly could prohibit the movement of such items into the State. *Clason v. Indiana*, 306 U.S. at 442 & n.2; *Clason v. Indiana*, — —Ind. —, —, 17 N.E.2d 92, 94 (1938). The Indiana court and this Court both recognized that, for purposes of analyzing a state measure under the Commerce Clause, there is no difference between a prohibition against movement out of the state and a prohibition of movement into the state. The Indiana Court framed the question as:

“[W]hether the state, in the exercise of its police power, may prohibit the *interstate* transportation of dead animals by a plan that allows *intrastate* transportation by its licensees under circumstances that may result in the profitable handling of such articles within the state.”

— Ind. at —, 17 N.E.2d at 94 (emphasis added). This Court addressed the question as framed by the appellant:

“[Whether] the Indiana Dead Animal Disposal Act of 1937 was valid as a reasonable regulation or quarantine and not invalid as a discriminatory prohibition of interstate commerce in commodities recognized as legitimate articles of intrastate commerce.”

306 U.S. at 443.

The Indiana statute upheld in *Clason* facially discriminated—it blocked commerce at the state line in articles which posed a risk to public health, while providing for commercial disposal within the state of identical in-state articles. The case can hardly be dismissed as “old” and of no modern relevance; the current version of the Indiana provision is essentially identical. See Ind. Code Ann. § 15-2.1-16-15. But under the Commerce Clause standard urged upon this Court by Petitioner and its

amici, this Indiana statute, previously upheld by this Court, would be struck down for blocking interstate commerce in articles which are permitted to be disposed of within that State.³⁰

Far from supporting the argument that Alabama cannot keep out out-of-state hazardous waste because it allows disposal of its own such waste, *Clason* is instructive because the case shows the in-state side of the quarantine cases—the states provide for regulated disposal within the state of in-state dangerous items, while controlling the importation of more such dangerous items from outside the state.

Just as Alabama requires in-state hazardous waste to be disposed of in accordance with the State’s requirements governing such disposal, while controlling the importation of additional hazardous waste, most, if not all, states require regulated disposal of in-state diseased or dead animals, plants infected with disease or insect pests, germ-infected articles or other items which might be harmful to health, safety or the environment, while prohibiting the importation of more such items into the state. The construction of the Commerce Clause advanced by Petitioner and its amici questions the constitutionality of all such state measures.³¹ If the Solicitor General is correct in

³⁰ The Indiana statute in *Clason* required in-state dead animals, an unavoidable by-product of livestock production, to be either disposed of on-site in accordance with the State’s requirements regulating the method of disposal, or transported in a regulated manner to permitted, regulated commercial disposal facilities. 306 U.S. at 440-42 & n.1. Similarly, Alabama requires in-state hazardous waste, to some extent an unavoidable by-product of industrial production, to be either disposed of on-site in accordance with Alabama’s requirements regulating the method of disposal, or transported in a regulated manner to permitted, regulated commercial disposal facilities.

³¹ Georgia, for example, prohibits the movement of dead animals into the State, except by special permit or for research purposes. Ga. Code Ann. § 4-5-8. Under the Commerce Clause “rule” advanced by Petitioner and the Solicitor General, this statute would

his assertion that "out-of-state articles of commerce must be treated the same as in-state articles of commerce when they are indistinguishable" (Brief of U.S. at 27), the only state which could constitutionally forbid the importation of diseased animals would be one whose cows never got sick.

It appears beyond question that a state may prohibit the importation of diseased livestock, even if similarly diseased livestock within the state may be treated with the hope that they may be cured, rather than being immediately destroyed and disposed of. But under the Solicitor General's "comparable treatment rule" (the only exception to which is "when the articles are *dissimilar*") (Brief of U.S. at 27, emphasis in original) a state would be without the power to restrict the importation of large numbers of contagious, diseased animals if there were any similarly sick animals within the state.

The "different threat" and similar/dissimilar distinction drawn by Petitioner and the Solicitor General is based on an erroneous interpretation of the basis of this Court's decision in *Maine v. Taylor*. States may prohibit the importation of sick cows, even though there are similarly sick cows within the state; the reason, apart from the origin of the out-of-state cows, is that they are *sick*. Alabama does not prohibit the importation of diseased Florida cattle because they are diseased *Florida* cattle, it does so because they are *diseased* Florida cattle. Likewise, Alabama does not control the importation of out-of-state hazardous waste because it is *out-of-state* hazardous waste, Alabama does so because it is out-of-state *hazardous* waste. Apart from its origin, it is *hazardous*. Like diseased livestock, animal carcasses, baitfish infected with parasites, germ-infested rags or other harmful items, the reason, apart from origin, for discrimination is the added danger to the state of having more such items present,

be invalid on the grounds that similarly dead animals occur and are disposed of within Georgia.

even if the state already has within its borders some similarly dangerous items.

B. The Quarantine Cases Were Decided on Principles Which Form the Basis for This Court's More Recent Decisions, And Are Indistinguishable From This Case.

The quarantine cases cannot be dismissed as having been decided on the basis of some antiquated notion that the articles involved were not "legitimate articles of commerce." This Court rejected that proposition in 1902, calling it "confusion of thought which has given rise to the misconception of the authorities." *Compagnie Francaise v. State Board of Health, Louisiana*, 186 U.S. 280, 390 (1902). The Court went on to state that such an argument

"ignores the fact that these cases expressly and unequivocally hold that the health and quarantine laws of the several states are not repugnant to the Constitution of the United States, although they affect foreign and domestic commerce, as in many cases they must do in order to be efficacious, because until Congress has acted under the authority conferred upon it by the Constitution, such state health and quarantine laws producing such effect *on legitimate interstate commerce* are not in conflict with the Constitution."

186 U.S. at 391 (emphasis added).

This Court in *Philadelphia v. New Jersey* stated that the numerous decisions upholding quarantine laws and the like were distinguishable because these cases involved articles "that required destruction as soon as possible because their very movement risked contagion and other evils." 437 U.S. at 628-29. Those cases, however, are not entirely distinguishable on that basis, because they generally did not involve such articles. For example, the cattle that were the subject of *Mintz v. Baldwin* did not require destruction, nor did their very movement cause a risk; they were reshipped back out of New York. 306 U.S. at 348; 2 F.Supp. at 701.

The Indiana statute upheld by this Court in *Clason* did not prohibit the very movement of dead animals. The statute provided for the regulated movement within the State to the 38 in-state commercial disposal facilities. *Clason v. Indiana*, — Ind. —, —, 17 N.E.2d 92, 93 (1938), *aff'd*, 306 U.S. 439 (1939).

These cases likewise generally did not involve laws which "simply prevented traffic in noxious articles, whatever their origin," as the Court suggested in distinguishing the cases. 437 U.S. at 629. And the cases did not, as argued by the Solicitor General here, involve measures which applied equally to intrastate and interstate commerce. The Indiana statute upheld in *Clason* prohibited interstate commerce while allowing regulated intrastate commerce. The New York measure upheld in *Mintz v. Baldwin* imposed a requirement for importation which did not apply to in-state cattle, while New York employed a different and less burdensome requirement to control the spread of the disease within the State. As the dissenting judge in the lower court stated:

Plaintiffs contend that the October order is a burden on interstate commerce and invalid for that reason also. Defendant asserts that it is not discriminatory and applies to all states alike outside of New York.

But it does discriminate in favor of New York cattle dealers and against all others. True, there is inspection provided by state law for New York state cattle, but there is no requirement in such inspection that to be sold in the state they shall come from a herd, all of whose members are free from Bang's disease. The October order requires this of imported cattle but not of domestic cattle.

* * * *

[I]t is a discrimination against citizens of all other states in favor of citizens of New York and is a burden upon interstate commerce.

2 F.Supp. at 715 (Cooper, J., dissenting)

The majority opinion in that case, however, which this Court affirmed, states: "There is not the slightest indication in the Supreme Court decisions that a state must have the same regulations for inspection of diseased cattle within its borders as it requires for those entering it." 2 F.Supp. at 705.³²

The Solicitor General mischaracterizes the quarantine cases as employing a balancing test similar to the approach of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Brief of U.S. at 24 and n.31. Actually, these cases generally analyze the state measures in question in a manner very similar to the modern "strict scrutiny" test as applied in *Maine v. Taylor*. For example, in *Hannibal & St. Joseph R.R. Co. v. Husen*, 95 U.S. 465 (1878), the Court struck down a Missouri statute prohibiting the importation of a broadly defined class of cattle, holding that Missouri could not exclude this whole class of cattle "without any distinction between such as may be diseased and such as are not." 95 U.S. at 469. This, of course, is just exactly what this Court would have done in *Maine v. Taylor* if the harmful baitfish could have been separated from the uninfected ones. The obvious basis for the holding, although not stated in these terms, is that there was a less discriminatory alternative available to serve the State's purpose—the discrimination could be more narrowly drawn to better identify the cattle which posed the risk sought to be protected against, and not unneces-

³² *Mintz v. Baldwin* is of significant modern-day relevance. The state regulatory scheme upheld in that case, requiring that any breeding cattle coming into the state originate from a herd officially certified as free from Bang's disease while requiring testing of individual animals for sales within the state of in-state cattle, is employed today in substantially the same form. See, e.g., Ala. Admin. Code, Chap. 80-3-1. Under the Solicitor General's "equal treatment rule" for similar articles, this regulatory scheme, on its face, would be unconstitutional. Indeed, the only judicial expression we have found even resembling the Solicitor General's "rule" in the context of potentially harmful articles is the dissenting opinion in the lower court in *Mintz*, which would have struck down this regulatory system. See 2 F.Supp. at 715-16.

sarily discriminate against healthy cattle. In *Kimmish v. Ball*, 129 U.S. 217 (1889), a measure which differed essentially only in that it more narrowly defined the cattle to be discriminated against was upheld, and *Husen* distinguished, on the basis that the State had adequately identified those cattle which posed risks to the State; i.e., there were no less discriminatory alternatives reasonably available. Further, in *Asbell v. Kansas*, the Court upheld a State measure prohibiting importation of diseased cattle where the cattle were inspected to identify those which were diseased; unlike the problem baitfish in *Maine v. Taylor*, diseased cattle could be identified by inspection.³³

In other cases, the Court upheld restrictions on interstate commerce only after finding that the state had a legitimate reason for the restriction, and that the measure did not unnecessarily restrict nondangerous items, such as healthy livestock, which could be separately identified—that is, that there were no reasonably available alternatives. See, e.g., cases cited *supra* n.23. In one case strikingly similar to *Maine v. Taylor* in this respect, the Court upheld against a dormant commerce clause challenge a restriction on the importation of all alfalfa hay from certain states, the purpose of which was to prevent the spread of the alfalfa weevil, on the grounds that it was not feasible to inspect the hay to identify which hay was infected with the eggs of this pest. (The Court went on to find the measure preempted by a federal measure.) *Oregon-Washington R. & Nav. Co. v. Washington*, 270 U.S. 87 (1926).

³³ This Court in *Asbell v. Kansas* did not uphold the Kansas law on the grounds that some similar requirement was imposed on intrastate movement of cattle; the Court upheld the law because the Commerce Clause does not preclude a state from controlling the movement of diseased cattle into the state, irrespective of what different and less burdensome measures the state may employ within the state. *Mintz v. Baldwin*, 2 F.Supp. 700, 705 (N.D.N.Y.), *aff'd*, 289 U.S. 346 (1933). ("There is not the slightest indication in the Supreme Court decisions that a state must have the same regulations for inspection of diseased cattle within its borders as it requires for those entering it.")

The Court was not engaging in a balancing test in these cases, and the regulatory measures involved generally were not "evenhanded." Just as in *Maine v. Taylor*, the Court in these older cases accepted that, if the state had a legitimate purpose, the state could restrict the importation in interstate commerce of the articles against which the state's purpose was to protect. And just as in *Maine v. Taylor*, the Court considered whether the state's purpose was being accomplished without unnecessarily discriminating against nondangerous items. The standard employed by this Court to judge the validity of state measures discriminating against interstate commerce—that the measures in question advance a legitimate state purpose which cannot be adequately served by reasonable nondiscriminatory alternatives—is not a new standard. It is a succinct expression of the reasoning employed by the Court in the numerous cases upholding legitimate exercises of the states' police power, or distinguishing invalid measures from those which were legitimate, over the almost century and a half that this Court has been reviewing such state measures under the Commerce Clause. This standard does not displace the quarantine cases, it summarizes them.

C. Petitioner's "Different Threat" Theory and the Solicitor General's "Comparable Treatment Rule" Are Based on an Erroneous Interpretation of This Court's Decision in *Maine v. Taylor*.

Petitioner and the Solicitor General imaginatively attempt to distinguish *Maine v. Taylor* from this case and the earlier quarantine cases by setting up a strawman "dispositive fact"—that Maine was attempting to exclude a new threat, one different in kind from any problem already existing in the State. They argue the "dispositive fact" was that at least one or more of the parasites had not been previously found in Maine. The error of this interpretation of that case is made clear simply by hypothetically assuming contrary facts and considering, under the Court's analysis, whether these facts would have changed the outcome of the case. Assume, for example,

that the parasites and non-native species had been fairly well established in Maine, and that Maine had an in-state program to control and limit the extent of environmental damage by regulating the growth and spread of the damage. Maine clearly would have a legitimate interest in controlling the growth of the problem. Prohibiting the importation of baitfish which increased the danger would serve a legitimate state purpose, because Maine's efforts to control the damage within the State would be futile if it could not control the importation of large numbers of additional harmful baitfish. Notwithstanding the fact that the imported baitfish were in all respects identical to those harmful baitfish within the State, Maine would have a reason, apart from origin, for prohibiting their importation—these additional problem fish would increase in degree the environmental damage the State sought to limit, and frustrate the State's efforts to control the problem existing within the State. The reason, apart from origin, is the environmental danger posed by the imported baitfish, not some difference between these baitfish and those already within the State.

In this hypothetical scenario, the "available nondiscriminatory alternative" test would be applied just as it was applied by this Court in the case. The Court would consider whether there were reasonably available alternatives which would allow Maine to exclude only the harmful baitfish without the necessity of excluding all baitfish. But under Petitioner's "different threat" theory, or the Solicitor General's "comparable treatment rule," Maine would have an available nondiscriminatory alternative, namely: to allow unlimited importation of the indistinguishable out-of-state baitfish, then nondiscriminatorily try to control the enormous additional problems within the State in the same manner that the State was employing to try to cope with the limited damage it already had.

Although this Court found it to be "of little relevance that fish can swim directly into Maine from New Hampshire," 477 U.S. at 151, under the standard proposed by Petitioner and the Solicitor General this possibility would

be very relevant. If the validity of Maine's control over the importation of baitfish turned on there being no similarly harmful baitfish within the State, the Maine statute would immediately become unconstitutional when a harmful fish swam into Maine. There would no longer be a "different threat." Because imported baitfish would no longer be dissimilar to in-state harmful baitfish, the Solicitor General's "equal treatment rule" would require that Maine allow uncontrolled importation of more harmful baitfish. The continued validity of the Maine statute would depend entirely on the nonoccurrence of a possibility the Court found to be of little relevance.

The analysis of the Court in *Maine v. Taylor* produces the same conclusion even if it is assumed that the out-of-state baitfish were indistinguishable from problem baitfish already within the State. Maine's power to ban the importation of baitfish rested on the *threat*, not on some different nature of the threat. This is consistent with this Court's earlier decisions considering prohibitions on the importation of diseased livestock and other dangerous articles.³⁴ These cases did not discuss, much less turn on, whether the particular harm was already present in the state. If such a pointless distinction were valid, many existing state health, safety and environmental regulations would be invalid on the grounds that they merely guard against increasing the degree of dangers, rather than against dangers different in kind.

D. A Standard of General Application, Based on the Construction of the Commerce Clause Argued by Petitioner and the Solicitor General, Would Invalidate Scores of Existing State Health, Safety, Environmental and Quarantine Laws and Regulations, Many of Which Are Identical or Indistinguishable From Measures Previously Upheld by This Court.

The Commerce Clause standard urged upon this Court by Petitioner and the Solicitor General has implications far broader than the context of state measures to control dangerous wastes. A standard of general application,

³⁴ See cases cited *supra* n.23.

based on the construction of the Commerce Clause argued by Petitioner and the Solicitor General, would invalidate scores of existing state health, safety, environmental and quarantine laws and regulations, many of which are identical or indistinguishable from measures previously upheld by this Court.³⁵ The only way to hold for Petitioner in this case without invalidating state measures which control the spread of other forms of "disease, pestilence and death",³⁶ is to carve out a special, unique rule under the Commerce Clause for the waste involved in this case. Such meticulous carving is more appropriately the role of Congress than of a Court enunciating constitutional principles.

E. This Additional Fee Is Constitutionally Indistinguishable From any Other Form of Regulatory Control Over Importation of Articles Which Spread Disease, Pestilence and Death.

This Court's decisions establish that states may impose such restrictions on interstate commerce as may be appropriate for public health and environmental protection. Petitioner and amici attempt to distinguish

³⁵ Examples of state statutes which appear to facially violate the Solicitor General's "equal treatment rule" include: Ark. Stat. Ann. § 2-22-11 (controlling importation of bees); Conn. Gen. Stat. Ann. § 22-325 (poultry); *id.* § 22-308 (cattle and goats); Del. Code Ann. tit. 3, § 7304 (cattle); Ga. Code Ann. § 4-4-119 (horses); *id.* § 4-5-8 (dead animals); Idaho Code § 25-214A (livestock); Mass. Gen. Laws Ch. 129, § 14D (hogs); R.I. Gen. Laws §§ 4-4-19, 4-5-7 (animals); Vt. Stat. Ann. tit. 6, § 1461 (animals).

³⁶ As this Court stated in *Bowman v. Chicago & Northwestern R. Co.*:

"Doubtless the States have power to provide by law suitable measures to prevent introduction into the States of articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence, and death The self-protecting power of each State, therefore, may be rightfully exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution."

125 U.S. at 489.

Maine v. Taylor and the older quarantine cases by arguing that the Additional Fee is merely a tax, and not a ban on importation. This Court's prior decisions upholding laws restricting commerce for health and environmental reasons have not always involved complete prohibitions on importation. For example, the New York measure upheld in *Mintz v. Baldwin* allowed cattle to be brought into the state for grazing, feeding, or slaughter. The measure was designed to control the risk by preventing cattle from moving into breeding or dairy herds, where the risks were greater. As the Court has stated, such measures "must vary with the nature of the disease to be defended against." *Smith v. St. Louis & Southwestern R. Co.*, 181 U.S. at 257. "It is the character of the circumstances which gives or takes from a law or regulation of quarantine a legal quality." *Id.*, 181 U.S. at 258. Under the circumstances of this case, an economic disincentive to the importation of waste is an appropriate measure to control the level of risk to which the State is exposed.

The use of an economic disincentive to influence and regulate behavior is not a novel idea, and is especially appropriate in the area of environmental regulation because it both allows for and forces a transition to alternatives while allowing the greatest flexibility in developing alternatives to the discouraged activity. For example, in sections 4861-62 of the *Internal Revenue Code*, Congress has implemented an economic disincentive in the form of an excise tax on ozone-depleting chemicals. The excise is scheduled to increase annually to ratchet up the disincentive, thereby increasing the incentive to find and use alternatives. Similarly, the "Gas Guzzler" excise tax in section 4064 of the *Internal Revenue Code* imposes a deterrent levy of up to \$7,700 (as doubled in 1990) on cars failing to meet specified fuel economy standards. These measures, like the Additional Fee, are not designed primarily to produce revenue; the ultimate objective is

that the environmental measures work and progressively produce less revenue.³⁷

Maine v. Taylor and the older quarantine cases involved the spread of harmful living organisms—parasites, smallpox virus, insects, germs in diseased animals or decayed meat. These living organisms multiply on their own; one germ becomes millions of germs, and the millions of germs cause the harm sought to be avoided. Drums of hazardous waste, of course, do not reproduce. It is not necessary, therefore, to exclude the first drum in order to control the potential harm of millions of drums. The risk created by hazardous waste and other similarly dangerous waste materials is proportional to the volume of such waste materials present (J.A. 18, 22, 51), and may be controlled by controlling that volume.³⁸ Obviously, 40,000 truckloads of hazardous waste in 1989 are far more threatening than four to six thousand truckloads of in-state waste. Pet. App. 62a. The argument that the rationale of the quarantine cases does not apply because Alabama has not totally banned the im-

³⁷ Economic incentives and disincentives are highly desirable, in appropriate contexts, as regulatory measures. This form of regulation allows the greatest flexibility for experimentation and innovation in the development of a variety of alternative methods to meet the goals of the regulatory action, as opposed to simply requiring industry to adopt the choice of a regulatory agency. The idea, of course, is that Adam Smith's "invisible hand," given the incentive, is more likely than the strong arm of government to ultimately produce the optimum solution. In spite of this, the amicus brief of the American Trucking Associations urges this Court to strip the States of all power to use this form of regulation, even though the States clearly would have the power to accomplish the same purposes by regulations requiring specific actions chosen by state regulators. Brief for American Trucking Associations at 12.

³⁸ As the Solicitor General recognizes, "Alabama's legitimate concerns relate to the volume of hazardous waste disposed of within the State, not to its source." Brief for U.S. at 19 (emphasis in original). Alabama is not controlling the importation of hazardous waste because of its source; the reason, apart from the origin of the waste, is that these large volumes of hazardous waste are dangerous.

portation of such waste fails to take into account this significant distinction.

Although hazardous waste is not directly analogous to disease organisms in that it takes only one germ to start an epidemic, the release of either may cause disease, pestilence and death, and thus the reasoning of the cases which allow discrimination against interstate commerce applies equally to poisons. In either case, the State's interest in protecting public health, safety, and the environment allows controls on interstate commerce. The fact that Alabama's restriction is in the form of an economic disincentive, which allows and encourages a transition, rather than a complete ban which might cause temporary inconveniences to the operations of some industries, does not alter this conclusion.

IV. Alabama's Differential Fee Structure Serves A Legitimate State Purpose Which Cannot Be Adequately Served By Any Nondiscriminatory Alternative.

A. Alabama's Differential Fee Structure Is Demonstrably Justified by Valid Factors Unrelated to Economic Protectionism.

Discriminatory statutes are struck down "unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Wyoming v. Oklahoma*, — U.S. —, 117 L.Ed. 2d 1, 22 (1992) (emphasis added). This Court has defined economic protectionism as "'measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Wyoming v. Oklahoma*, 117 L.Ed. 2d at 22 (quoting *New Energy Co.*, 486 U.S. 269, 273). The legislative findings accompanying the Act, the trial court's findings and the record in this case clearly establish that Alabama's differential fee structure was designed to protect the health and safety of the State's citizens and the integrity of the environment. The health, safety, and environmental dangers resulting from landfilling these wastes are a valid factor, unrelated to economic protectionism, justi-

fying Alabama's restriction on the importation of the wastes.³⁹

The transportation of hazardous waste to landfills, where the wastes remain hazardous *forever*, merely amounts to moving a problem from one place to another, and postponing the time when the social, environmental and economic costs of finally dealing with the problem must be faced. Transporting such waste from one state to a landfill in another also shifts these social, environmental and economic costs to a different set of voters and taxpayers. The bulk of Petitioner's business consists of shifting these problems from other states to Alabama, and transferring to Alabama the perpetual economic and social costs.

Petitioner argued below that Alabama need not worry about the perpetual risks to the state of holding in its lap what is probably the largest collection of dangerous materials of this type ever assimilated in one place in the history of mankind, simply because the State may attempt to recover under federal law future clean-up costs from those responsible for the waste.⁴⁰ Aside from the fact that this argument ignores the question of whether the social and environmental consequences can ever be measured in dollars, Petitioner failed to point out the exception which swallows the general rule of joint and several liability. The federal statute cited as creating liability, 42 U.S.C. § 9607, also *completely absolves* from

³⁹ Far from being designed to benefit in-state economic interests, the Act itself anticipates significant *adverse* local economic effects. Section 7 of the Act (Pet. App. 110a-111a) commits the State to make payments to local government bodies to offset the adverse economic impact of a reduction in the volume of waste disposed of at Emelle. As shown by a Livingston University study (C.R. 471-508) Petitioner's waste disposal business is the driving force in the regional economy of west-central Alabama.

⁴⁰ This assumes that the waste generators can be identified. But in the case of out-of-state waste which has moved through brokers, the identity of the generator and the source of the waste is unknown even to Petitioner. See *supra* n.24.

liability the owner or operator of a facility, the generators of the hazardous waste, all other potentially liable persons where clean-up is made necessary due to acts of third parties or acts of God, such as tornadoes or earthquakes. 42 U.S.C. § 9607(b). In the event of a major natural disaster, *no one would be liable*.

Petitioner argues that Alabama's fee structure amounts to simple economic protectionism simply because Alabama hazardous waste generators may dispose of their wastes in Alabama at a cost lower than the cost to out-of-state waste generators to dispose of their wastes *in Alabama*. Brief for the Petitioner at 26. Similarly, if Alabama provides for the management within the State of diseased plants or animals, Alabama producers may be advantaged relative to producers in states which fail to make such provision. In either case, any competitive disadvantage is *not* caused by the state which has provided for the needs of its own industry, it is caused by the failure of the disadvantaged producer's state to permit or provide for the infrastructure necessary to that producer's operations. The failure of one state to permit management within the state of its own dangerous articles does not compel another state to take up its burden.

Maine baitfish producers undoubtedly prospered as an incidental effect of Maine's actions and this Court's decision. And Alabama industry may benefit relative to industries in states which refuse to accept their responsibility for permitting the development of waste disposal infrastructure, as an incidental effect of Alabama's efforts to protect its environment and the health of its citizens. These incidental effects do not transform clearly legitimate measures to protect against grave dangers into forbidden economic protectionism.

Petitioner and amici argue that it is economically more efficient to ship waste a short distance across state lines than a longer distance within a state. This is obviously true, but it explains only a tiny fraction of the movement of out-of-state waste to west-central Alabama. If the

Emelle facility were simply receiving most or all of Mississippi's waste, and perhaps some from other adjacent or nearby states, it is unlikely that Alabama would have ever felt the need to enact legislation of this kind. But "economic efficiency" and "natural market forces" entirely fail to explain why hazardous waste is hauled all the way across the continent to Alabama. The level of traffic in hazardous waste is not due to the value of commerce in the waste. It is due instead to the fact that other states force such waste to be exported due to the negative value, the risk, of having such waste within the state, and the fear that any attempt at in-state disposal will result in an inability to protect the state from large-volume importation of more hazardous waste.⁴¹ Political forces, not market forces, drive this flow of hazardous waste.

The argument that citizens of other states do not elect Alabama's officials has another side—Alabama citizens, who are bearing the burden of those other states' hazardous waste, do not elect those champions of the environment in other states who refuse to provide for disposal of their own such wastes. "Send it to Alabama" is far easier to implement than a responsible waste management policy.⁴²

⁴¹ One of the greatest obstacles to the development of new facilities in other states is the understandable fear, arising from overly broad interpretations of *Philadelphia v. New Jersey*, that any effort to manage their own waste will result in litigation which may leave the local citizens powerless to protect themselves from being buried in hazardous waste from other states. Under the interpretation of the Commerce Clause advanced by Petitioner and its supporters in this case, it would be a foolish state indeed that would issue a permit for any new commercial hazardous waste disposal facility.

⁴² The fact that Alabama has tolerated the landfilling in the State of large volumes of out-of-state hazardous waste in past years, and only acted to slow the flow somewhat after the volumes had become overwhelming, indicates that the interests of out-of-state hazardous waste generators are in fact quite well represented in Alabama. Petitioner, its numerous employees and local businesses serving Petitioner and its employees are a significant in-state economic interest adversely affected by any reduction in the volume of hazardous waste imported for landfilling.

Similarly, industries in other states find it much more palatable to argue in this Court, as amici, for their "right" to send their waste to Alabama cheaply, than to be environmental villains at home by suggesting that their own state permit the infrastructure necessary for them to operate. Alabama has implemented waste minimization programs to control and reduce the in-state production of hazardous waste, but these efforts are futile if the State continues to be overwhelmed by additional waste from outside the State.⁴³ The only means available to Alabama citizens to protect themselves from the "send it elsewhere" waste management policies of other states is to make Alabama a *less* attractive alternative than a responsible state waste management policy.

Petitioner and its amici argue that Alabama citizens enjoy the products of other states, the production of which may produce pollution such as air or water discharges in those states, but wish to avoid the problems of the hazardous waste generated by that production. Of course, those states are free to control, to whatever extent they desire, those air and water pollution problems. Many of those states are also controlling the hazardous waste produced by requiring that it all be sent out of the state. That an Alabama citizen buys a car does not mean that he must be forced to bear the burden of *all* of the hazardous waste generated in the production of *all* of the cars sold in the entire nation, simply because citizens of other states wish to avoid the problem entirely.

⁴³ With imported hazardous waste accounting for approximately ninety percent of all hazardous waste landfilled in Alabama, the State's efforts to reduce the generation of hazardous waste within the State by technical assistance in developing process modifications and other similar means (see R.T. 260-61; 287-88) can have no significant impact in reducing the dangerous volumes of hazardous waste accumulating in the State. If Alabama were able to reduce in-state hazardous waste generation by *one-half*, this would amount to a mere five percent reduction in the landfilling of hazardous waste in the State.

Disposal capacity for Alabama's waste is not an issue in this case. Petitioner's Vice President of Operations for the Southern Region, Rodger Henson, testified that the Emelle facility alone had capacity for at least another 100 years of operations, without a reduction in the rate of accumulation. J.A. at 9. And there is no shortage of other potential locations. The chalk formation which Petitioner claims to be particularly well suited for locating such facilities is extensive across Alabama (and several other states). J.A. 52; R.T. 471-72, 622. Even with no restrictions on the rate of accumulation of waste at the Emelle facility, there is no imminent (or even foreseeable) shortage of existing capacity for the disposal of Alabama's own hazardous waste, and no shortage of other potential sites for the disposal of the State's waste. The argument that Alabama is simply "conserving" a place to dispose of its own hazardous waste is factually erroneous.

Petitioner and its amici seek to analogize Alabama's restriction on the dumping of out-of-state hazardous waste at the Emelle facility to the hoarding of a natural resource for in-state use. But that facility is not a "natural resource." It is an engineered, artificially created, man-made facility⁴⁴ which exists and operates solely at the pleasure of the State of Alabama. Unlike coal, or oil or natural gas, the Emelle facility did not simply happen to occur in Alabama as an accident of nature. The facility was created only because the State allowed it to be created, and continues to exist and operate only because the State finds it to be in the State's own interest to provide for the disposal of *its own* hazardous waste. Petitioner's "right" to bury hazardous waste there is limited to the right to bury only such waste as the

⁴⁴ Petitioner's expert witness and long-time consultant William Brummond testified that a hazardous waste landfill could be engineered to meet regulatory requirements in most if not all states. J.A. 142-43. As explained in the amicus brief submitted by the States of Ohio and Kentucky, there are few locations where a facility *cannot* be designed to meet regulatory requirements.

State may find to be in the State's interest to permit. The Emelle facility is not a natural resource; it is an activity, or land use, which poses grave dangers to the State. The State may tolerate this activity only to the extent that it serves the State's purpose, and the State may limit the activity to that extent.

B. Alabama's Legitimate Purpose Cannot Be Adequately Served by Any Nondiscriminatory Alternative.

Under this Court's precedents, a state measure restricting the importation of out-of-state articles is valid under the Commerce Clause where the measure serves a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.⁴⁵ *New Energy Co.*, 486 U.S. at 728; *Maine v. Taylor*, 477 U.S. at 140. It cannot be credibly disputed that Alabama has a legitimate interest in controlling the significant health and environmental risks created by the landfilling of enormous quantities of highly dangerous wastes while, at the same time, providing for the regulated disposal of the State's own dangerous waste. The differential fee structure is designed to serve this purpose by reducing the volume of such waste imported into the State for landfilling, without also causing Alabama's own waste to be sent to other states for disposal. The issue raised by Petitioner in this case is whether the final requirement of the test—that the State's purpose cannot be served by available nondiscriminatory alternatives—compels *every* state to choose between either refusing to permit disposal within the State of its own hazardous waste, or accepting its responsibility to manage its own waste at the cost of bearing the perpetual burden of serving as the permanent burial ground for the hazardous waste of those states which choose to avoid their own problems.

⁴⁵ "This is perhaps just another way of saying that what may appear to be a 'discriminatory' provision in the constitutionally prohibited sense—that is, a protectionist enactment—may on closer analysis not be so." *New Energy Co.*, 486 U.S. at 278.

Petitioner contends that Alabama's purpose to reduce the amount of hazardous waste coming into the State for burial could be served as well by imposing an equal fee on disposal of both in-state and out-of-state waste. If the State's purpose included an attempt to encourage its own hazardous waste to be sent out of the State, Petitioner's argument would be correct. But Alabama's purpose is not to force responsibility for its own waste disposal burdens on citizens of other states. The State's purpose in enacting the differential fee structure is to accept the State's responsibility for dealing with its own waste, while protecting its citizens and environment from the risks caused by the importation of large volumes of additional wastes.

An equal fee, at any level, would necessarily fail to serve the State's purpose. An equal fee high enough to provide any significant deterrent to the importation of hazardous waste for landfilling in the State would amount to an attempt by the State to avoid its responsibility to deal with its own problems, by tending to cause in-state waste to be exported for disposal. An equal fee not so high as to amount to an attempt to force Alabama's own problems to be borne by citizens of other states would fail to provide any significant reduction in the enormous volumes of imported hazardous waste being dumped in the State. At the point where an equal fee would become effective to serve the State's purpose in protecting public health and the environment from uncontrolled volumes of imported waste, that equal fee would also become an avoidance of the State's responsibility to deal with its own waste problems.

Under Petitioner's theory of the Commerce Clause, the State's purpose as described above becomes two mutually exclusive goals. A state can accept responsibility for providing for the disposal of its own waste, in which case it must then also accept the burden and inherent dangers of receiving all such wastes from all other states. Or the state can protect its citizens and environment

from burial within the State of overwhelming volumes of waste, by abdicating its responsibilities and trying to force its own waste on other states. Given such a choice, the inevitable result is clear. States will refuse to permit the disposal within the state of their own wastes. Those states which do permit waste disposal will be increasingly overwhelmed by volumes of out-of-state waste. In fact, this situation has already developed⁴⁶ as a result of the holdings of several lower federal courts, relying on *Philadelphia v. New Jersey* to summarily strike down any state measure controlling "waste."

V. The Public Interest In The Safe Management Of Hazardous Waste Would Be Better Served By Recognizing, Rather Than Destroying, The Ability Of The States To Control The Interstate Movement Of Hazardous Waste.

A. A Holding by This Court That States Are Powerless To Control the Importation of Hazardous Waste Would Virtually Assure That No State Will Permit the Development of any New Commercial Hazardous Waste Disposal Facilities.

Public awareness of the dangers associated with hazardous waste has made the permitting of new hazardous waste disposal facilities very difficult. A holding by this Court that any such facility which is permitted must be allowed to import and leave the local community burdened with such additional hazardous waste as the operator of the facility may choose would make the permitting of any new commercial hazardous waste landfill a political impossibility. However responsible state officials or the public generally may wish to be about managing their own hazardous waste, no one is so foolish as to allow their local community or their State to become the toxic waste dump for the entire nation. A decision of this Court

⁴⁶ The existing imbalance, between the few states with commercial hazardous waste disposal facilities and the relatively numerous states that effectively ban out-of-state waste by refusing to permit such facilities within the state, is discussed at length in the amicus briefs submitted in support of Alabama.

destroying the ability of the states to manage their own hazardous waste and control the additional burdens of imported waste would perpetuate and worsen the "reverse Balkanization" which exists in the disposal of hazardous waste.

Petitioner and its industry seek this Court's assistance to maximize the short-term profitability of the few existing sites at the expense of the people in the states where those few sites are located. The public interest, however, as thoroughly examined and discussed in the amicus briefs submitted by the State of South Carolina, the States of Ohio and Kentucky, and the State and Local Legal Center, lies in the states having the ability to plan for and manage hazardous waste disposal. As the capacity of the few existing sites is exhausted, new sites will be needed. These new sites are unlikely to be developed if allowing their development carries the penalty of having to allow them to operate under the rules Petitioner seeks to have enshrined as a requirement of the Constitution.

B. Affirming the Decision of the Supreme Court of Alabama Will Not Adversely Affect Proper Management of Hazardous Waste.

The greatest obstacles to the development of new hazardous waste disposal facilities include not only the "NIMBY" syndrome, but also the compounding effect of the "fear of *Philadelphia*" syndrome. Clarification by this Court that States may permit the development of hazardous waste disposal facilities free of the fear that such development will result in the local community being drowned in an uncontrolled flood of imported waste will greatly facilitate, not impair, the development of adequate disposal capacity to manage the nation's waste. The specter of "Balkanization," and the other horrors paraded across the briefs, are nothing more than scare tactics, an attempt to influence the Court to base a decision on supposed "bad" consequences rather than upon a reasoned analysis of constitutional principles. Balkan-

ization has not occurred, and is not likely to occur. It should not be presumed that states will act irresponsibly. Waste importing states like Alabama and South Carolina have been quite accommodating considering the burdens and risks transferred to them, and have sought merely to slow the rate of increase in these burdens. Indeed, the reasonableness of Alabama's approach is recognized even by those states that are transferring their burdens and dangers to Alabama, as evidenced by the amicus briefs filed in this case as well as the differential fee-based approach in the policy recently adopted by the National Governors Association. See *supra* n.19 and accompanying text. Congress has established the federal policy that the exercise by the states of their traditional police powers should be the means by which hazardous waste management is accomplished.⁴⁷ Alabama's differ-

⁴⁷ As explained in detail in the amicus brief filed by the State of South Carolina, Congress in RCRA specifically authorized the states to regulate the management and disposal of hazardous wastes. If a state program meets statutory requirements, the state "is authorized to carry out such program in lieu of the federal program." 42 U.S.C. 6929(b). Alabama's program was authorized pursuant to this federal statutory scheme in 1987. 52 Fed. Reg. 46466 (Dec. 8, 1987). EPA review of state program changes is available. 42 U.S.C. § 6926(e); 40 C.F.R. §§ 271.22-23. Review of EPA decisions is available in the Circuit Courts of Appeals. 42 U.S.C. § 6973(b). One of the statutory requirements for authorization is that the state program be consistent with the federal or state programs in effect in other states. 42 U.S.C. § 6926. In regulations promulgated by EPA under its congressionally-delegated authority, EPA treats this consistency requirement as the federal statutory standard determining the extent to which states may regulate the interstate movement of hazardous waste; state program provisions, including fees, are authorized unless the provision "unreasonably restricts, impedes, or operates as a ban" on the interstate movement of waste. 40 C.F.R. § 271.4(a). EPA has expressly rejected the applicability of the dormant Commerce Clause and determined that several state programs imposing higher disposal fees on out-of-state waste satisfied the congressional standard governing state restrictions on interstate movement of waste. 54 Fed. Reg. 27170 (June 28, 1989) (Ohio); 53 Fed. Reg. 16264 (May 6, 1988) (Maine); 50 Fed. Reg. 46437 (Nov. 8, 1985) (South Carolina). A holding by this Court that a state's differential fee structure is invalid under the der-

ential fee structure is a reasonable and valid exercise of the State's police power to protect the health and safety of its citizens and the integrity of its environment, and not violative of the Commerce Clause.

CONCLUSION

The Supreme Court of Alabama correctly followed this Court's decision in *Maine v. Taylor*. Alabama has a reason, apart from the origin of the hazardous wastes involved, to control importation of those wastes—they are wastes that are “inherently dangerous to human health and safety and to the environment.” Pet. App. 11a. The decision of the Supreme Court of Alabama should be affirmed.

mant Commerce Clause would create the anomalous situation of raising questions as to the validity under the *dormant* Commerce Clause of state fee structures which have been specifically approved by EPA, acting under its delegated congressional authority, as not violating a statutory standard established by Congress in the *exercise* of its commerce power.

As explained in the amicus brief submitted by the State of New York, Congress also recognized the necessity of state control over interstate movement of hazardous waste when it enacted the capacity assurance provision of § 104(c)(9) of the Superfund Amendments and Reauthorization Act (SARA), 42 U.S.C. § 9604(c)(9).

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OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC., PETITIONER

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA;
ALABAMA DEPARTMENT OF REVENUE; AND
JAMES M. SIZEMORE, JR., COMMISSIONER OF THE
ALABAMA DEPARTMENT OF REVENUE, RESPONDENTS

On Writ of Certiorari to the
Supreme Court of Alabama

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

No one disputes that the State of Alabama has a legitimate interest in protecting its citizens against risks to public health that might be posed by hazardous waste despite the extraordinarily detailed federal and state regulatory regimes.¹ Here, Alabama asserts that "[t]he risk created by hazardous waste and other similarly dangerous waste materials is proportional to the *volume* of such waste materials present, and may be controlled by controlling that volume." Br. 38 (citation omitted; emphasis in original). The question in this case is whether the discriminatory means chosen by Alabama to promote that interest complies with the Constitution.

Alabama could have enacted a reasonable, non-discriminatory cap on the amount of waste that may be disposed of annually at the Emelle Facility. Or it could have imposed an even-handed waste disposal tax. Or it could have adopted stricter statutes and/or rules to fill the gaps it perceives in its own existing regulatory plan, which already is stricter than the federal regime. Each of these alternatives, of course, would have imposed equal burdens on Alabama waste generators and out-of-state generators.

Alabama instead chose to impose a heavy tax only on waste generated outside the State. But if Alabama's concern is the risk created by disposal of large amounts of waste and if, as the State concedes (Br. 20), there is no difference in the risk per ton from in-state and out-of-state waste, why does the origin of the waste matter? All that should be relevant is the total amount of waste disposed of at the Emelle Facility and the safety precautions followed there.

¹ We vigorously *do* dispute Alabama's wildly inaccurate description of the magnitude of those risks. Because that disagreement is not relevant to the legal issue before this Court, however, we have deferred our correction of Alabama's misstatements to pages 19-20, below.

The answer is obvious. Alabama wants to tax the disposal of waste, but it wants to exempt Alabama waste generators from the significant economic burden imposed by that tax. Alabama wants to reduce the volume of waste disposed of at the Emelle Facility, but it wants to ensure that Alabama generators are not inconvenienced by the reduction. In short, Alabama's tax is "an obvious effort to saddle those outside the State with the entire burden of slowing the flow of [waste into the Emelle Facility]. That legislative effort is clearly impermissible under the Commerce Clause of the Constitution." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978). This Court should reverse the judgment below and remand the case for the award of retrospective and ancillary relief. See Pet. Br. 40-42.

I. THE \$72 TAX DISCRIMINATES AGAINST INTER-STATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE.

Alabama does not dispute that hazardous waste is an item of "commerce" within the meaning of the Commerce Clause (Br. 23). And it apparently concedes (Br. 31-33, 39-40) that the law imposing the \$72 tax discriminates against interstate commerce on its face. Alabama's principal argument (Br. 19-39)—which rests on a tortured reading of *City of Philadelphia* and the so-called "quarantine" cases—is that a state has plenary authority to discriminate against interstate commerce in "dangerous items." It also advances several other purported justifications for the discriminatory tax.²

² Amici Ohio, *et al.*, assert (Br. 13-16) that discriminatory taxation is justified by a supposed difference between in-state and out-of-state waste: Alabama allegedly lacks the ability to inspect out-of-state waste streams to ensure that each different kind of waste is disposed of in the proper manner. This contention is not properly before this Court because it was not presented to the courts below. *Robertson v. Seattle Audubon Soc'y*, No. 90-1596 (U.S. Mar. 25, 1992), slip op. at 11. See also *Kamen v. Kemper Fin. Servs., Inc.*, 111 S. Ct. 1711, 1717 n.4 (1991).

In any event, the factual premise of amici's contention is quite wrong. Alabama's waste management regulations forbid CWM to

A. There Is No "Dangerous Items" Exception To The Commerce Clause.

Although Alabama couches its argument in terms of diseased animals and hazardous waste, its "dangerous items" exception to generally-applicable Commerce Clause principles would in fact sweep quite broadly. Much of modern-day commerce, including such common items as paint, chemicals, gasoline, mothballs, and insecticides, may reasonably be denominated as "dangerous." See American Trucking Associations, Inc. (ATA), Am. Br. 7-9. Under Alabama's approach, a state could apply a discriminatory tax to such goods manufactured out of state, while imposing no tax burden on identical in-state goods. There is no basis in this Court's jurisprudence for opening such a gaping loophole in the Commerce Clause.

1. City of Philadelphia.

Respondents' "dangerous items" exception to the Commerce Clause's antidiscrimination principle is squarely

dispose of any waste without first obtaining "a detailed chemical and physical analysis of a representative sample of the waste." Ala. Admin. Code r. 335-14-6-.02(4)(a)1. The regulations further require CWM to "inspect and analyze each hazardous waste movement received at the facility to determine whether it matches the identity of the waste specified on the accompanying manifest or shipping paper." *Id.* r. 335-14-6-.02(4)(a)4. Finally, the Alabama Department of Environmental Management ("ADEM") plays an active role by requiring out-of-state generators to apply for approval of each waste stream before it may be disposed of in Alabama. *Id.* r. 335-14-3-.08. As part of this pre-approval process, generators must provide ADEM with, among other things, an analysis of the waste, a description of the waste's physical characteristics, and information about the availability of alternative treatment methods or recycling options. *Id.* r. 335-14-3-Appendix II. Alabama plainly has the ability to ensure proper disposal of out-of-state waste streams.

Finally, notwithstanding respondents' contrary assertion (Br. 20 n.24, 40 n.40), Alabama's regulations *do* require brokers to provide the information described above and accordingly fully enable the State to ensure proper disposal of *all* waste delivered to the Emelle Facility.

inconsistent with this Court's decision in *City of Philadelphia*. There, New Jersey defended its ban on disposal of out-of-state waste on the ground that waste disposal was detrimental to public health and the environment. The state supreme court found that the law "advanced vital health and environmental objectives." 437 U.S. at 620; see also *id.* at 625. This Court did not overturn the lower court's determination that the purpose and effect of the statute was to protect public health. It instead concluded that "whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *Id.* at 626-627.

Respondents recognize (Br. 15) that their theory is inconsistent with "the language of" *City of Philadelphia* and argue that the Court's opinion does not mean what it says. According to respondents (Br. 15, 21-22), *City of Philadelphia* actually rests on the Court's determination that New Jersey failed to prove that waste is dangerous to public health. The Court supposedly held the statute unconstitutional because it determined that New Jersey was seeking to "protect in-state interests from out-of-state economic competition" (Br. 19).

Respondents fail to understand that even though a statute's overall purpose and effect may be to protect public health, the discriminatory aspect of that statute may be "protectionist," and therefore violative of the Commerce Clause, because it is not justified by public health concerns. The critical focus is whether "the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 (1992) (emphasis added). "Economic protectionism" thus constitutes a label embodying the legal conclusion that the particular provision in question *either* was enacted with the purpose of protecting in-state economic interests *or* has the effect of protecting such interests by discriminating unnecessarily against interstate commerce. See Pet. Br. 26-28 & nn. 16-17.

Consistent with this principle, the Court held in *City of Philadelphia* that—even if the New Jersey legislature actually was motivated by a desire to protect public health and even if barring disposal of out-of-state waste would in fact have that effect—New Jersey's public health argument could not justify discriminating against interstate waste because there was "no basis to distinguish out-of-state waste from domestic waste" by reference to "[t]he harms caused by waste." 437 U.S. at 629.

Here, just as in *City of Philadelphia*, the particular legislative means are plainly protectionist. Given Alabama's stated purpose—reducing the volume of waste disposed of at the Emelle Facility—and the undisputed fact that in-state waste and out-of-state waste are indistinguishable, the State can have no health-related reason for taxing only out-of-state waste and exempting Alabama waste from the burdensome tax. That is pure protectionism. See Pet. Br. 26. The Court's conclusion in *Wyoming v. Oklahoma*, *supra*, is applicable here as well: "Such a preference for [waste] from domestic sources cannot be characterized as anything other than protectionist and discriminatory, for the Act purports to [tax waste generated] in other States based solely on its origin." 112 S. Ct. at 800. See also *New Energy Co. v. Limbach*, 486 U.S. 269, 279 (1988) (discriminatory nature of tax provision could not be justified on public health grounds because the distinctions based on state of origin were unrelated to that purpose).

2. The Quarantine Cases.

Respondents rely heavily (Br. 24-39) upon the quarantine cases as support for their contention that states may exercise plenary authority to discriminate against interstate commerce in "dangerous items." In fact, the principle established by the quarantine cases is considerably more limited than the broad proposition advanced by respondents.

There are significant factual differences between the present case and all of the quarantine cases. Each of the

state laws upheld as quarantines in fact imposed a quarantine—it *banned the importation* into the State of designated animals or crops in order to protect public health and/or the environment. Moreover, these statutes all addressed situations in which public health and/or the environment was threatened by a pest or *communicable* disease. Because neither of these factors is present in this case, the \$72 tax cannot be upheld on a quarantine theory.

Many of the opinions in the quarantine cases provide little explanation of the basis for the ruling. *Reid v. Colorado*, 187 U.S. 137 (1902), is an exception. The Court there considered a challenge to a Colorado statute that “prevent[ed] the introduction of infectious or contagious diseases among the cattle and horses of that State.” *Id.* at 138. The statute prohibited the bringing into the State of cattle and horses that either “ha[d] an infectious or contagious disease” or had been in contact with such animals within 90 days prior to their importation. *Id.* at 138-139.

This Court upheld the quarantine. It first observed that “the purpose of a statute * * * must be determined by its natural and reasonable effect” and that “a State may not, by its police regulations, *whatever their object*, unnecessarily burden foreign or interstate commerce.” 187 U.S. at 150-151 (emphasis added). The Court determined that the Constitution does not convey

the *right* to introduce into a State, against its will, live stock affected by a contagious, infectious or communicable disease, and whose presence in the State will or may be injurious to its domestic animals. The State * * * may protect its people and their property against such dangers, taking care always that the means employed to that end do not go beyond the necessities of the case or unreasonably burden the exercise of privileges secured by the Constitution of the United States.

Id. at 151 (emphasis in original). The Court concluded that because Colorado had reasonably determined that all animals falling within the terms of the statute are “or-

dinarily, in such condition that their presence in the State may be dangerous to its domestic animals,” the import ban did not violate the Commerce Clause. *Ibid.*

Reid makes clear that the fact that the diseased animals posed a danger to Colorado livestock did not by itself preclude Commerce Clause scrutiny of the state legislation. The Court still found it necessary to ensure that “the means employed * * * do not go beyond the necessities of the case or unreasonably burden the exercise of [constitutional] privileges.” 187 U.S. at 151. That standard is virtually identical to the one applicable to any statute that discriminates against interstate commerce: whether the law “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” *New Energy Co.*, 486 U.S. at 278. Thus, respondents are plainly wrong in contending that the quarantine cases establish a unique exception to ordinary Commerce Clause analysis for statutes regulating “dangerous” items. Indeed, respondents themselves acknowledge (Br. 33) that the generally-applicable *New Energy Co.* standard “is a succinct expression of the reasoning employed by the Court” in the quarantine cases.

The reason that the results in the cases upholding quarantine measures differ from the result in *City of Philadelphia*, and from the proper result in this case, is not the legal test. Rather, the explanation is the particular nature of the “legitimate local purpose” underlying the statutes at issue in the quarantine cases and the rationality of the state’s decision to ban all importation of the quarantined product. The Court observed in *Reid* that the statute reflected the State’s determination that the presence within its borders of *any* diseased livestock posed a threat to Colorado cattle and horses. It further found that the State’s determination was reasonable. As respondents themselves point out (Br. 38), it is obvious why a quarantine is a reasonable response to a threat of a contagious disease or other pest: “These living organisms multiply on their own; one germ becomes millions of germs, and the millions of germs cause the harm sought

to be avoided.” Because no measure short of a quarantine could protect the State against the risk of widespread transmission of the disease to local animals, the statute was upheld.

The same rationale animates the rest of the quarantine cases. Each of the quarantines rested on the state’s reasonable determination that the mere presence within its borders of even a single additional infected plant or animal would be dangerous to public health or the environment because of the risk that the contagion would spread.³

Here, Alabama has invoked a very different—and much more limited—local purpose. Alabama does not, and can-

³ *Maine v. Taylor*, 477 U.S. 131 (1986); *Mintz v. Baldwin*, 289 U.S. 346, 349-350 (1933); *Oregon-Washington Railroad & Navigation Co. v. Washington*, 270 U.S. 87, 93, 95-96 (1926); *Asbell v. Kansas*, 209 U.S. 251, 254, 256 (1908); *Smith v. St. Louis & Southwestern Railway*, 181 U.S. 248, 257-258 (1901); *Rasmussen v. Idaho*, 181 U.S. 198, 201-202 (1901); *Missouri, Kansas & Texas Railway v. Haber*, 169 U.S. 613, 628, 630 (1898); see also *Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health*, 186 U.S. 380 (1902) (exclusion of healthy persons from area infested with contagious disease); *Bowman v. Chicago & Northwestern Railway*, 125 U.S. 465, 489, 490-491 (1888) (ban on importation of liquor held unconstitutional; although state had declared liquor injurious to public health, that was not sufficient to extend quarantine theory beyond class of objects that threaten to spread contagion); *Railroad Co. v. Husen*, 95 U.S. 465 (1877) (quarantine statute held unconstitutionally broad).

A number of cases cited by respondents (Br. 19-20 n.23) do not address the constitutionality of quarantine statutes. *Sligh v. Kirkwood*, 237 U.S. 52 (1915) (ban on sale, shipment, and delivery of citrus fruit not fit for consumption); *Crossman v. Lurman*, 192 U.S. 189 (1904) (ban on manufacture, possession, and sale of adulterated foods or drugs); *Louisiana v. Texas*, 176 U.S. 1 (1900) (denying leave to file a bill of complaint on jurisdictional grounds); *Kim-mish v. Ball*, 129 U.S. 217 (1889) (upholding statute imposing liability for damage caused by diseased cattle). Respondents place considerable reliance (Br. 25-27) on *Clason v. Indiana*, 306 U.S. 439 (1939), but that case did not involve a quarantine or any other form of import ban. It involved a ban on *exporting* of dead animals. Certainly the legal principles underlying that decision cannot be controlling in determining the constitutionality of an entirely different type of statute.

not, justify the tax on the ground that the presence of a single additional ton of waste in the State presents an uncontrollable threat to public health. Respondents state that “[i]t is not necessary * * * to exclude the first drum [of waste] in order to control the potential harm of millions of drums” (Br. 38); Alabama wishes only to curtail the total volume of hazardous waste *disposed of* within the State, not to exclude all waste.⁴ Indeed, because “the purpose of a statute * * * must be determined by its natural and reasonable effect” (*Reid*, 187 U.S. at 151), and the natural effect of the tax is to reduce *disposal* volume—not to prohibit, or even limit, the movement of waste into the State—that must be Alabama’s purpose.⁵

Alabama’s purpose here, unlike the purpose underlying the quarantine measures, *can* be achieved by less discriminatory means: for example, a reasonable even-handed cap on disposal volumes or an even-handed tax on disposal of hazardous waste. There accordingly is no justification for upholding the discriminatory tax. See *City of Philadelphia*, 437 U.S. at 629 (observing that the New Jersey statute could not be upheld on a quarantine theory because it did not “simply prevent[] traffic in noxious articles” and because there was no claim “that

⁴ Moreover, as respondents themselves point out (Br. 38), the risk invoked by Alabama is significantly different in kind from that posed by a plant or animal infected with a contagious disease or other living organism: “Drums of hazardous waste, of course, do not reproduce.”

⁵ Respondents hint in a footnote (Br. 23 n.26) that the State is entitled to justify the discriminatory tax on the basis of the potential health risk from movements of waste within Alabama. But—in sharp contrast to the quarantine statutes, which banned *importation* of the prohibited items and therefore directly regulated transportation—Alabama’s tax applies only to disposal and does not limit transportation of waste at all. Thus, Alabama cannot invoke that purpose to justify the tax. See also *Illinois v. General Elec. Co.*, 683 F.2d 206, 214 (7th Cir. 1982), cert. denied, 461 U.S. 913 (1983) (rejecting argument based on alleged transportation risks because statute in question did not regulate transportation).

the very movement of waste into or through New Jersey endangers health").⁶

In sum, Alabama's discriminatory tax is wholly distinguishable from the measures upheld in the quarantine cases. Contrary to respondents' claim (Br. 35-36), the Court can invalidate the tax without disturbing that line of precedents.

B. The Discriminatory Tax Cannot Be Justified By Reference To Future Financial And Environmental Risks Supposedly Borne By Alabama.

Amici National Governors' Association, *et al.*, (NGA) contend that the Additional Fee is not really discriminatory because it merely compensates Alabama citizens for the risks associated with hosting a hazardous waste disposal facility. Respondents hint (Br. 40-41) at a similar claim. To the extent such risks exist, of course, they would not vary with the waste's state of origin. Accordingly, they provide no basis for a discriminatory tax. Pet. Br. 34-35.⁷

⁶ Respondents argue (Br. 36-39) that the rationale of the quarantine cases applies equally to "economic disincentive[s]" because a state is entitled to vary its response depending on the nature of the environmental threat. But, as we have shown, the quarantine cases do not rest on some notion of expanded state authority in the area of public health. They uphold what is indisputably "strong medicine" in terms of impact on interstate commerce—a total ban on imports into a state—where a state can properly invoke a very important interest and there are no nondiscriminatory means to protect that interest. (Even *Mintz v. Baldwin*, 289 U.S. 346 (1933), on which respondents rely (Br. 37), involved a flat ban on imports of infected cattle for the particular purposes that presented a threat to the environment.) The question in each case must be whether the state's purpose is legitimate and whether the state has shown that it cannot effectuate its purpose through less discriminatory means.

⁷ Respondents state (Br. 40-41) that the "act[] of God" exception "swallows" CERCLA's rule that all generators, owners, and operators are jointly and severally liable for the costs of remediating releases at a hazardous waste disposal facility, implying that Alabama ultimately will be left holding the bag in the event of a natural

NGA contends that the tax is nonetheless even-handed. Because the citizens of Alabama already bear the future risks from Alabama-generated waste by virtue of the Emelle Facility's presence in the State, the argument goes, they may insist on compensation from out-of-state industry for accepting the future risks associated with out-of-state waste.

The notion that a tax can be rendered non-discriminatory by considering unquantifiable burdens on in-state residents as a whole is preposterous. Indeed, this Court has refused even to weigh different taxes against each other, stating: "[i]mplementation of a rule of law that a tax is nondiscriminatory because other taxes of at least the same magnitude are imposed by the taxing State on other taxpayers engaging in different transactions would plunge the Court into the morass of weighing comparative tax burdens." *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 289 (1987) (internal quotation marks and citation omitted).⁸

The compelling logic underlying the Court's refusal to engage in the "weighing of comparative tax burdens"

disaster at the Emelle Facility. But that exception applies *only* when an unforeseeable natural disaster is the *sole* cause of a release. 42 U.S.C. § 9607(b). Even if a natural disaster were the sole cause of a release, respondents' suggestion that Alabama would have to bear the full cost of the cleanup is flatly wrong. To begin with, EPA's RCRA regulations require operators of hazardous waste disposal facilities to take corrective action whenever there is a release, *regardless of the cause*. 40 C.F.R. § 264.100-264.101. Moreover, if petitioner were for some reason unable to take the required corrective action, the federal government is authorized to do so. See 42 U.S.C. § 9604(a).

⁸ NGA does not even cite, let alone reconcile, *Scheiner* or the Court's other cases making it crystal clear that a facially discriminatory tax will be considered non-discriminatory if and only if it merely complements a similar tax on "substantially equivalent" in-state activity. See, e.g., *Tyler Pipe Indus., Inc. v. Washington State Dep't of Rev.*, 483 U.S. 232, 244 (1987); *Armco Inc. v. Hardesty*, 467 U.S. 638, 643 (1984); *Maryland v. Louisiana*, 451 U.S. 725, 759 (1981); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 331-332 (1977).

applies with even greater force to the weighing of tax burdens against unquantifiable burdens of "potential environmental and health problems" (NGA Br. 15). Indeed, the fundamental flaw in NGA's argument is that there is no way of determining the point at which a tax goes beyond simply compensating for the inchoate burdens associated with being a host state: is it \$50 per ton, \$72 per ton, \$100 per ton, or \$1,000 per ton?⁹ Nor is there any sound reason for refusing to weigh into the balance both the unquantifiable benefits enjoyed by Alabama citizens from the out-of-state products whose manufacture resulted in the generation of hazardous waste and the unquantifiable health and safety risks borne by the citizens of the states in which those products were manufactured. If weighing comparative tax burdens is a "morass," weighing unquantifiable potential harms is a bottomless tar pit.

C. Alabama's Asserted Interest In Making A Privately-Owned Waste Disposal Facility Available To Intrastate Commerce, But Not To Interstate Commerce, Is Not A "Legitimate Local Purpose."

Alabama does not rely solely on health and safety justifications in defending the discriminatory tax. Apparently recognizing that those factors alone cannot justify the discrimination against interstate commerce, respondents also assert (Br. 45) an interest in "providing for the regulated disposal of the State's own dangerous waste." Depicting itself as a state that has "accept[ed] responsibility for providing for the disposal of its own waste" (Br. 46), Alabama asserts the right to do so

⁹ Relying upon *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), NGA asserts (Br. 17-18 n.13) that this Court does not require that in-state and out-of-state burdens be identical. But *Clover Leaf* did not involve discrimination against interstate commerce. The issue there was whether the state law at issue imposed a "clearly excessive" burden on interstate commerce. *Clover Leaf Creamery*, 449 U.S. at 471. By definition, exactitude is unnecessary when applying that standard.

without being forced to permit disposal of out-of-state waste as well.

The most obvious flaw in Alabama's argument is that the State does not own the Emelle Facility. It did not make the investments in research, technology, and personnel required to establish that facility and comply with the myriad regulations governing every aspect of its operations. Thus, while respondents' brief is full of self-serving assertions of "responsibility," Alabama—and its many businesses that generate hazardous waste—are in fact beneficiaries of petitioner's investments.

What Alabama seeks, therefore, is not the right to provide for disposal of waste generated within the State. It seeks to force *petitioner*—a private entity—to serve in-state commerce on a preferred basis. Far from a "legitimate local purpose," no state interest could conflict more squarely with the Commerce Clause's basic goal—making "our economic unit * * * the Nation." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537 (1949).

This Court has recognized "the basic principle that a 'State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State.'" *City of Philadelphia*, 437 U.S. at 627 (citation and footnote omitted). Alabama plainly could not levy a tax on private landowners' sales of timber to out-of-state persons, exempting all sales to Alabama residents, on the ground that it wanted to limit the risk of deforestation but at the same time ensure that its citizens had enough lumber. Neither could the State require Alabama steel mills to purchase coal from local mines on the ground that a shut-down of those mines would create environmental hazards. The Commerce Clause bars the states from restricting a business's access to the interstate market in order to ensure that the business serves local interests. But that is precisely what the State seeks to do here.

Were respondents' argument accepted, a state could close its borders to indigents from other states on the ground that it should be permitted to take care of its own problems without also having to take care of the problems of other states. Yet this Court has struck down just such a law as violative of the Commerce Clause. *Edwards v. California*, 314 U.S. 160 (1941). Under respondents' theory, a state could forbid private hospitals from caring for out-of-state patients: why, the state could ask, should we bear the burdens associated with caring for out-of-state residents merely because other states did not site enough hospitals to serve their own citizens? Cf. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974). Similarly, respondents' theory would justify a state law barring private employers from hiring out-of-state residents to work on a state-sponsored project. The state could argue that by sponsoring the project it had acted "responsibly to address its unemployment problem and should not have to help other states deal with theirs. Cf. *United Bldg. & Constr. Trades Council v. City of Camden*, 465 U.S. 208 (1984). If statutes such as these were valid, however, the theory upon which the Commerce Clause was based no longer would be.¹⁰

D. A State May Not Discriminate Against Interstate Commerce In Order To Make Up For What It Perceives To Be The Shortcomings Of Its Sister States.

Respondents (Br. 40, 42-43) and amici South Carolina, *et al.* (Br. 3-4, 8-20, 25-26), complain that other states have failed to provide for disposal of the hazardous waste generated within their borders, thus transferring to those states with existing disposal facilities the burden of that waste. They further assert that the federal gov-

¹⁰ Remarkably, respondents contend (Br. 41) that any disadvantage to out-of-state generators is a result of the failure of their own states to provide a means of waste disposal, not a result of Alabama's discriminatory tax. On that theory, no discriminatory statute would ever violate the Commerce Clause: the disadvantage to the out-of-state business could always be blamed on the failure of its own state to provide a parallel discriminatory advantage.

ernment has failed to induce states to site new disposal facilities. According to respondents and their amici, those states that already host facilities should be permitted to use self-help to accomplish what Congress and the EPA have failed to do. Without the ability to discriminate, respondents warn, no state will authorize new disposal facilities.¹¹

This policy argument has no basis in this Court's precedents: the Commerce Clause does not have a "self-help" exception. Assuming for current purposes that the federal statutory and regulatory scheme has failed to achieve its goals, Congress—not this Court—is the appropriate forum for such arguments. As the United States observed in its brief at the petition stage (at 11), the concerns of Alabama and its amici "may properly be presented to Congress as a basis for urging enactment of federal legislation specifically authorizing States within which major hazardous waste disposal facilities are located to adopt designated limitations on interstate waste shipments."¹²

Indeed, the history of the Low-Level Radioactive Waste Policy Amendments Act (LLRWPA) of 1985 illustrates that Congress can be quite responsive to such requests. Before enactment of that legislation, two federal appellate courts had invalidated state statutes banning the disposal of out-of-state nuclear waste. See

¹¹ The fact that the Additional Fee applies with full force to generators in states that *have* sited hazardous waste disposal facilities proves that this argument is a post hoc rationalization that had nothing to do with the actual purpose of the Additional Fee.

¹² The policy statement of the National Governors Association (NGA), on which respondents (Br. 12-13) and their amici rely, does *not* endorse self-help by states such as Alabama. Rather, it calls on Congress to act and endorses some protection for waste generators in states without disposal facilities, such as a phase-in period for any discriminatory fees. Moreover, respondents are wrong in asserting that the NGA has endorsed a particular multiple for discriminatory fees. The NGA in fact has not taken a position on that question. (Respondents' references are to a report issued by a subgroup that was not endorsed by the full association.)

Washington State Bldg. & Constr. Trades Council v. Spellman, 684 F.2d 627 (9th Cir. 1982), cert. denied, 461 U.S. 913 (1983); *Illinois v. General Elec. Co.*, 683 F.2d 206 (7th Cir. 1982), cert. denied, 461 U.S. 913 (1983). In the wake of those decisions, Congress concluded that there were not adequate incentives for states to authorize additional sites for disposal of such waste. It accordingly enacted the LLRWPA, which provided a range of incentives for the siting of new disposal facilities, including a provision authorizing host states in particular circumstances to discriminate against waste generated in states that had not sited facilities. See 42 U.S.C. § 2021e(e).¹³

If Alabama and its amici want to be able to discriminate against out-of-state hazardous waste as a means of forcing other states to site disposal facilities, they should follow the model of the LLRWPA and seek authorization from Congress, which can weigh the competing interests of the states, together with the national interest in a safe and efficient waste disposal system, and craft an appropriate solution. In the absence of such authorization, discriminatory taxes are not a permissible means of accomplishing the states' goals.

II. CONGRESS HAS NOT AUTHORIZED THE STATES TO IMPOSE DISCRIMINATORY TAXES ON OUT-OF-STATE WASTE.

New York and South Carolina assert that Alabama's facially discriminatory Additional Fee does not run afoul of the Commerce Clause because Congress has authorized the states to impose discriminatory taxes on out-of-state waste. New York candidly (and correctly) concedes (Br. 4 n.3) that Alabama did not preserve this issue in

¹³ Some other provisions of that Act have been subject to constitutional challenge (see *New York v. United States*, No. 91-543 (argued Mar. 30, 1992)), but there is no dispute that Congress may authorize a state to discriminate against interstate commerce in order to provide other states with an incentive to site disposal facilities.

the courts below. Indeed, respondent Sizemore filed a brief in the trial court asserting that "[t]he present case falls within the scope of the dormant Commerce Clause, because Congress has not specifically regulated in the area of fees imposed on the commercial disposal of hazardous waste." R. 2064.

Because these statutory authorization arguments were not "squarely considered by the [lower courts] nor advanced by respondents in this Court," the Court should decline to address them. *Robertson v. Seattle Audubon Soc'y*, No. 90-1596 (U.S. Mar. 25, 1992), slip op. at 11. See also *Kamen v. Kemper Fin. Servs., Inc.*, 111 S. Ct. 1711, 1717 n.4 (1991). Application of this principle is particularly appropriate when, as here, the issue presented by the amici is of importance to the United States but has been raised only after the United States has filed its briefs. (We have lodged with the Clerk of this Court a copy of an amicus brief filed by the United States in a Fourth Circuit case presenting similar issues.)

In any event, the amici's various authorization arguments are meritless. This Court has made it crystal clear that "Congress must manifest its unambiguous intent before a federal statute will be read to permit or to approve such a violation of the Commerce Clause as [New York and South Carolina] here seek[] to justify." *Wyoming v. Oklahoma*, 112 S. Ct. at 802.

The Superfund Amendments and Reauthorization Act (SARA), upon which New York places its exclusive reliance, in no way "manifest[s]" Congress's "unambiguous intent" to permit facially discriminatory taxes of the sort at issue here. SARA merely requires states to ensure disposal capacity for in-state wastes upon pain of losing Superfund monies. Nothing in the language of the Act authorizes states to accomplish this goal by means of facially discriminatory taxes. *National Solid Wastes Management Ass'n v. Alabama Dep't of Environmental Management*, 910 F.2d 713, 721-722 (11th Cir. 1990), modified on other grounds, 924 F.2d 1001, cert. denied,

111 S. Ct. 2800 (1991); *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 792, 794-795 (4th Cir. 1991).

Amici South Carolina, *et al.*, rely upon a different statute, contending (Br. 2, 22-24) that the provision of the Resource Conservation and Recovery Act (RCRA) authorizing "more stringent" state regulations, together with a decision by the EPA approving South Carolina's discriminatory fee under RCRA, indicate that states generally are authorized to discriminate against out-of-state waste. As with SARA, the language of RCRA provides not the least indication that Congress intended to abrogate the Commerce Clause's antidiscrimination principle in the hazardous waste management area. Indeed, the "savings clause" on which South Carolina relies (42 U.S.C. § 6929) is indistinguishable from the federal provision held insufficient to authorize discriminatory state legislation in *Wyoming v. Oklahoma*, 112 S. Ct. at 802. See also *Hazardous Waste Treatment Council*, 945 F.2d at 792.

South Carolina also relies on a provision of the statute stating that, upon a determination by the EPA that a state's hazardous waste regulatory program is "consistent with" federal law and other state programs, the state may engage in hazardous waste regulation "in lieu of" the federal program. 42 U.S.C. § 6926. One provision of the EPA regulation implementing this consistency requirement provides that a state program will be found "inconsistent" if an aspect of the program "unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States." 40 C.F.R. § 271.4.

Neither of these provisions provides the requisite unambiguous manifestation of congressional intent to effect an "affirmative grant of power to the states to burden interstate commerce 'in a manner which would otherwise not be permissible.'" *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982) (citation omitted). See *Hazardous Waste Treatment Council*, 945 F.2d at

793-794. Congress plainly contemplated that the states would employ their already-existing police power to establish a state hazardous waste management program that would, in turn, be reviewed by the EPA. The "consistency" requirement set forth in the statute and spelled out in the regulation is a *limitation* on the types of laws that may be included in a state's authorized plan. A limit on state authority simply cannot constitute a clear and unambiguous authorization of expanded state authority.¹⁴

Finally, to the extent the RCRA process has any relevance to the Commerce Clause issue, the fact that EPA may have blessed South Carolina's fee is irrelevant here, as the amici acknowledge (Br. 2). Here, not only has EPA not approved Alabama's discriminatory fee, it has signed a brief in this Court urging that the fee be struck down as violative of the Commerce Clause.

III. RESPONDENTS HAVE DISTORTED THE NATURE OF THE ALLEGED RISKS.

As indicated above (at 1 n.1), facts regarding the Emelle Facility or hazardous waste management generally are irrelevant to the issue before this Court: the only relevant fact is the undisputed determination that in-state waste is indistinguishable from out-of-state waste. Nonetheless, because respondents' overall presentation of the facts as well as several of their specific factual assertions are either inaccurate or misleading, we feel compelled to set the record straight.

The most important distortion in respondents' brief is the overall picture they paint of a ticking toxic timebomb that presents an imminent threat of harm to Alabama residents. But, as we discussed in our opening brief (at 12-13), the trial court's findings relate to unlikely contingencies: given the strict regulatory scheme and the

¹⁴ Thus, in order to be valid and enforceable, a state statute must comply with both the consistency requirement (which is administered by the EPA) and the Commerce Clause (which is enforced by the courts).

extreme impermeability of the 700 foot thick layer of chalk underlying the Emelle Facility, the trial court could not—and did not—find that any of the potential risks it identified were likely ever to become reality. Respondents' assertion (Br. 36, 39) that Alabama citizens are under a perpetual threat of "disease, pestilence, and death" is unfounded and irresponsible.

Space limitations do not permit us to respond to all of respondents' assertions. In addition to those discussed above (at 3 n.2, 10-11 n.7), we here highlight two more.

First, respondents rely (Br. 5) upon a GAO report for the assertion that the Emelle Facility has a serious leakage problem. However, the report does not purport to address the Emelle Facility specifically; rather it reports on hazardous waste facilities generally (including non-commercial facilities). As respondent Hunt himself has acknowledged, the Emelle Facility is "probably one of the safest such facilities in the country." J.A. 66.

Second, respondents spill much ink creating the implication (Br. 5-7) that "poisonous leachate" from the Emelle Facility has escaped into the environment. That claim is false. Petitioner maintains dozens of monitoring wells surrounding the disposal trenches that contain hazardous waste. These wells, which serve as an "early monitoring system" to detect migration of hazardous materials out of the trenches, are routinely checked for the presence of contaminants. There is no evidence of migration of leachate from the trenches. Tr. 156 (testimony of Rodger Henson).

CONCLUSION

The judgment of the Supreme Court of Alabama should be reversed.

Respectfully submitted.

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MAR 11 1992

In the Supreme Court of the United States THE CLERK

OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC., PETITIONER

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA,
ET AL.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a disposal tax that applies only to wastes generated outside the State violates the Commerce Clause.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-471

CHEMICAL WASTE MANAGEMENT, INC., PETITIONER

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA,
ET AL.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

Petitioner, the operator of a large-scale commercial waste disposal facility in Emelle, Alabama, challenges Alabama legislation imposing burdens on the management of hazardous waste generated outside of Alabama. The United States Environmental Protection Agency has a vital interest in maintenance of the national market in hazardous waste treatment, storage and disposal. In addition, the Emelle facility is one of only two facilities east of the Mississippi River authorized under federal law to dispose of polychlorinated biphenyls (PCBs); it is also licensed to dispose of a wide range of other hazardous wastes. It accordingly receives substantial shipments from hazardous waste sites subject to cleanup under the

Superfund program, and is extensively used by agencies of the United States for storage of the hazardous wastes they generate.

At this Court's invitation, the United States filed a brief amicus curiae at the petition stage of this case.

STATEMENT

1. Hazardous wastes are defined by federal law as solid wastes which may "pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of, or otherwise managed." § 1004 (5) (B) of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6903(5) (B) (RCRA).¹ Subtitle C of RCRA, 42 U.S.C. 6921-6939b, directs the Environmental Protection Agency (EPA) to establish a comprehensive "cradle to grave" system regulating the generation, transport, storage, treatment

¹ Solid wastes are defined in 42 U.S.C. 6905 (27) as:

discarded material including solid, liquid, semisolid or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities * * *.

The statutory definition specifically excludes domestic sewage and point source discharges regulated under the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, as well as certain material regulated under the Atomic Energy Act, 42 U.S.C. 2011 *et seq.* Therefore, hazardous wastes do not typically include nuclear (radioactive) wastes, although certain "mixed" radioactive and hazardous wastes are regulated under RCRA as well as the applicable nuclear waste statute. See generally Gov't Br. in *State of New York v. United States*, *County of Allegheny v. United States*, and *County of Cortland v. United States*, Nos. 91-543, 91-558, and 91-563. The Emelle facility is not authorized to accept mixed wastes. Chemical Waste Management, Inc., RCRA Permit No. ALD 000 622 464 (May 27, 1987).

and disposal of hazardous wastes.² To implement this regime, RCRA directs EPA to "promulgate criteria for identifying the characteristics of hazardous waste, and for listing hazardous waste." 42 U.S.C. 6921. EPA's regulations identify hazardous wastes in two ways. First, "characteristic" hazardous wastes, subject to regulation under Subtitle C of RCRA, include wastes that exhibit any of four specific properties (ignitability, corrosivity, reactivity, and toxicity). See 40 C.F.R. Pt. 261, subpt. C. Second, "listed" hazardous wastes are identified in published lists of specific hazardous wastes (40 C.F.R. Pt. 261, subpt. D). Most of these wastes are listed because they contain significant levels of hazardous constituents³ which, if released into the environment, could present a substantial threat to human health and the environment. There are more than 500 listed wastes.⁴

² Under RCRA, States may be authorized to implement a state program in place of the federal program, if, *inter alia*, the state program is "equivalent to" and "consistent with" the federal program. 42 U.S.C. 6926 (b). In general, once a State is so authorized, the State, and sometimes also the federal, requirements apply, and the State becomes the permitting authority. In addition, "[n]othing in [RCRA] shall be construed to prohibit any State * * * from imposing any requirements * * * which are more stringent than those imposed by [federal] regulations." 42 U.S.C. 6929. Currently, 47 States and territories—including Alabama—have authorized RCRA programs. DRPA, Inc., *Authorization Tracking Data System Report* (Feb. 12, 1992).

³ "Hazardous constituent" is a term of art referring to those constituents compiled in Appendix VIII of 40 C.F.R. Pt. 261 that serve as the basis for listing a waste as a toxic hazardous waste. 40 C.F.R. 268.2 (b). See 40 C.F.R. 261.11 (a) (3).

⁴ Certain wastes, such as household wastes, and certain petroleum, agricultural and mining wastes, are excluded from regulation under subpart C. 40 C.F.R. 261.4.

Thus, the term "hazardous waste" covers a wide variety of wastes that pose different types of threats to human health and the environment. For example, various forms of heavy metals such as cadmium and lead may leach into soils and the groundwater if exposed to the elements. Some organic chemicals may be extremely hazardous to human health at low levels of exposure. See generally 55 Fed. Reg. 11,798 (1990). Paint wastes may be ignitable at relatively low temperatures, and therefore are dangerous if not properly managed. See 55 Fed. Reg. 22,543 (1990).

Approximately 240 million tons of hazardous waste are generated in this country annually by some 80,000 generators. *Hearing Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 4 (1991) (testimony of Don R. Clay, Assistant Administrator for Solid Waste and Emergency Response). Most of these wastes are generated by the chemical industry; the rest come from a wide variety of industrial processes, including petroleum refining, metal finishing, general manufacturing, electronics, printing, health services, and transportation. See EPA, *1987 Biennial Report Data Analysis* (1992). Particular types of wastes are generated in volumes ranging from a few tons annually (*e.g.*, certain laboratory wastes) to several million tons annually (*e.g.*, corrosive or acid wastes generated by the chemical industry). Generators of hazardous waste are subject to provisions of RCRA governing, *inter alia*, labeling, manifesting, and packaging. 42 U.S.C. 6922.

Pursuant to RCRA, facilities that treat, store or dispose of listed or characteristic hazardous wastes must obtain a permit or interim status, and must comply with applicable regulations. 42 U.S.C. 6924,

6925. Nationwide, there are approximately 4,700 facilities operating under federal permits authorizing the treatment, storage and disposal of some form of hazardous waste; these facilities contain approximately 81,000 distinct waste management units. EPA, *The Nation's Hazardous Waste Management Program at a Crossroads: The RCRA Implementation Study* 7 (1990). EPA has promulgated detailed regulations prescribing minimum operating standards for the management of hazardous waste at these facilities. 40 C.F.R. Pts. 264, 265. For each type of facility, the regulations govern such matters as inspection, testing, methods of treating incompatible wastes, groundwater monitoring, insurance requirements, recordkeeping and reporting requirements and performance standards.⁵ *Ibid.*

In addition, the regulations prescribe specific requirements for the facility's design and operation, specify closure and post-closure procedures, and impose financial responsibility requirements, as well as general facility standards such as security, contingency planning, and siting location standards.⁶ In

⁵ Special requirements apply to particular wastes, and certain forms of treatment, storage or disposal are prohibited for certain wastes. For example, the placement of bulk or non-containerized liquids or waste-containing free liquids in landfills is prohibited. 40 C.F.R. 264.314. Some wastes may not be incinerated, 40 C.F.R. 264.344; others may be placed in surface impoundments only in accordance with an EPA-approved plan. 40 C.F.R. 264.231.

⁶ For example, the regulations prohibit or restrict the siting of facilities near areas of seismic activity, in 100 year floodplains, or in salt dome formations, salt bed formations, or underground mines or caves. 40 C.F.R. 264.18, 265.18. See generally EPA, *Permit Writers' Guidance Manual for Haz-*

conjunction with the Department of Transportation, EPA also regulates the transportation of hazardous wastes. See 42 U.S.C. 6923.⁷

In 1984, Congress amended RCRA to minimize reliance on land disposal. Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (HSWA). As amended, Subtitle C of RCRA phases out most land disposal of untreated hazardous wastes.⁸ Ultimately, all waste placed in land disposal units must either be treated to meet standards established by EPA under RCRA § 3004 (m) (42 U.S.C. 6924(m)), amended by § 202(a), 98 Stat. 3232-3233), or be disposed of in a land disposal unit from which EPA has determined that there will be no migration of hazardous constituents for as long as the waste remains hazardous. See 42 U.S.C. 6924(d), (e), and (g).⁹

ardous Waste Land Storage and Disposal Facilities, OSWER Directive No. 9472-00-1 (Feb. 1985).

⁷ Approximately 20,000 transporters are regulated under RCRA. EPA, *RCRIS National Oversight Database* (1992).

⁸ Land disposal includes, but is not limited to: "any placement of such hazardous waste in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, or underground mine or cave." 42 U.S.C. 6924(k).

⁹ Section 3004(m) (2) of RCRA, 42 U.S.C. 6924(m) (2), authorizes the land disposal of wastes otherwise subject to a prohibition, provided that the wastes are "treated to a level or by a method specified" by EPA pursuant to Section 3004 (m) (1), 42 U.S.C. 6924(m) (1). That Section instructs EPA to establish levels or methods for the treatment of a hazardous waste which diminish the toxicity of the waste, or reduce the likelihood of migration, so that the threat to human

The pretreatment standards for the land disposal of most hazardous wastes have been promulgated.¹⁰ Unless a "capacity variance" is approved by EPA to delay the effective date of the treatment standards because adequate treatment capacity does not exist, wastes must be pretreated prior to land disposal. If EPA has approved a capacity variance for a particular waste, that waste may be land disposed without meeting the prescribed treatment standard, but only at sites where minimum prescribed technological requirements are met. 42 U.S.C. 6924(h) (4) and (o). Petitioner's Emelle facility is one of a limited number of land disposal sites that meets these statutory requirements.

health and the environment is minimized. To satisfy this directive, EPA has required treatment to specified levels (*e.g.*, numerical constituent requirements) or by identified methods in order to minimize threats. For example, certain organic wastes, including some pesticides, must be incinerated. 55 Fed. Reg. 22,612 (1990). Other wastes require a series of treatments: for example, the prescribed treatment method for one group of wastes includes treatment by electrolytic oxidation, followed by alkaline chlorination, followed by precipitation, settling and filtration. 54 Fed. Reg. 26,600 (1989).

¹⁰ The first phase of the "land ban," covering certain listed solvent and dioxin-containing wastes, became effective November 8, 1986. 42 U.S.C. 6924(e) (1). The land ban for another group of wastes known as "California list wastes," including PCBs, halogenated organic compounds, and certain liquid wastes, took effect July 8, 1987. 42 U.S.C. 6924(d). The standards for most other hazardous wastes were promulgated between 1988 and 1990. EPA is now in the process of setting the standards for "newly identified" wastes, *i.e.* those listed or identified as hazardous since RCRA was amended by HSWA.

2. Most of the hazardous waste in this country is disposed of in surface impoundments on the site where it is generated. Nevertheless, each year almost 4 million tons of it is transported across state lines for recycling, treatment and disposal using a wide variety of treatment and disposal technologies. Every State exports some types of hazardous waste, and all but twelve States import some form of hazardous waste. *1987 National Biennial RCRA Hazardous Waste Report* 2-36. Fourteen States export more than half of their hazardous wastes; in nine States, out-of-state wastes constitute more than 50% of the waste managed. *Id.* at 2-41. On average, States export wastes to 19 other States, to take advantage of 12 different types of management technology. National Solid Wastes Management Ass'n, *Interchange of Hazardous Waste Management Services Among States* 8, 12 (Dec. 31, 1990).

Given the nature of the hazardous waste management industry, such interstate transactions are inevitable. A wide range of factors—economic and environmental—dictates the choice of hazardous waste management facilities. Some wastes are generated in such small amounts that it is impractical to require a facility to treat or dispose of them in every State in which they are generated, or even in most States. In many cases, treatment or disposal facilities are so capital intensive that their economic viability depends upon the fact that there are only a few of them in the country.¹¹

¹¹ For example, there are currently a small number of large regional hazardous waste disposal facilities: 35 commercial land disposal facilities in 17 States, and 15 commercial incinerators in 9 States. Memorandum from Suzanne Rudzinski, Environmental Protection Agency, to Regional Hazardous

The new land disposal pretreatment regulations promulgated under HSWA have intensified the specialization of the hazardous waste market and highlighted the advantages of economies of scale. In general, the regulations encourage the incineration and recycling of hazardous waste. Because they require more technically complex and costly treatment prior to land disposal, many smaller generators cannot afford to treat their wastes on site, or do not possess the technical expertise to do so. In addition, the new regulations encourage existing disposal facilities such as deepwells and landfills to add treatment processes, thus tending further to integrate the hazardous waste management industry.¹²

In sum, the business of treating, storing and disposing of hazardous wastes is extraordinarily complex. For a significant portion of those wastes—depending on the type of waste involved and/or the size and sophistication of the generating company—

Waste Branch Chiefs (May 6, 1991). Attempts to establish smaller facilities have not proved commercially feasible. One commentator notes that Iowa recently considered establishing a long-term storage facility in the State to serve in-state needs. Based on the relatively small amount of waste the facility would handle, the per ton storage cost would have been several times greater than the cost of existing out-of-state disposal. Alex Brown & Sons, Environmental Services Group, *Hazardous Waste: Land Disposal Update* 7 (Oct. 13, 1989).

¹² Similar increases in off-site treatment and the use of commercial treatment facilities can be expected from other recently promulgated EPA regulations—those specifying stringent air emissions standards for boilers and industrial furnaces (56 Fed. Reg. 7134 (1991)), and Clean Water Act pretreatment and discharge standards (33 U.S.C. 1317(b) and (c); 40 C.F.R. Pt. 403).

commercial treatment, storage or disposal in another State in the only realistic alternative.

3. Congress has recognized the necessity for long range planning to assure the continued availability of adequate facilities to treat and dispose of hazardous wastes. In 1986, the Superfund Amendments and Reauthorization Act (SARA) required each State (as a condition of receiving federal cleanup funds) to demonstrate that it has access to "adequate capacity" for the "destruction, treatment or secure disposition" of the hazardous wastes "reasonably expected" to be generated in the State during the following twenty-year period. 42 U.S.C. 9604(c) (9)(A). The capacity can be "outside the State in accordance with an interstate agreement or regional agreement or authority." 42 U.S.C. 9604(c) (9)(B).¹³ The assurance of capacity has to be acceptable to the United States, and the capacity must comply with RCRA. 42 U.S.C. 9604(c) (9)(C) and (D).

EPA has interpreted the SARA capacity assurance provision in a series of guidance documents,¹⁴ which indicate that an exporting State's reliance on out-of-state capacity to satisfy its capacity assurance requirement must be in accordance with an interstate

¹³ See 132 Cong. Rec. 28,436 (1986) (remarks of Sen. Chafee) ("A site in every State is not required. In some cases, multi-State efforts may be appropriate. Use of binding agreements through interstate compacts guaranteeing access to a facility is only one example of how a State may provide the requisite assurances."). Accord 132 Cong. Rec. 29,741 (1986) (statement of Rep. Florio).

¹⁴ Assurance of Hazardous Waste Capacity: Guidance to State Officials, OSWER Directive No. 9471.00-01 (formerly No. 9010.00 (Dec. 1988)); supplemented by OSWER Directive No. 9471.00-02 (formerly 9010.00a (Oct. 1989)) and OSWER Directive No. 9471.00-01a (Apr. 15, 1991).

agreement, regional agreement, or similar authority. However, a State may not ban the import of wastes to the facilities upon which it is relying to provide its own assurance of capacity. So interpreted, the capacity assurance program aims to create an adequate nationwide capacity to provide for the disposal of hazardous wastes expected to be generated during the next twenty years. With adequate capacity in place, generators of hazardous wastes can choose between the alternative facilities available for the treatment and disposal of wastes. But the capacity assurance program does not dictate where the wastes expected to be generated in each State will actually be treated and/or deposited.

4. This action was instituted in Alabama circuit court by petitioner, the owner and operator of the Emelle Facility, a commercial hazardous waste treatment and disposal landfill in western Alabama operating under both federal and state permits. RCRA, 42 U.S.C. 6924(a); Ala. Code § 22-30-12 (1990). The suit challenges, on federal and state constitutional grounds, Alabama Act No. 90-326, 1989 Ala. Acts 90-326, § 3, which imposes "an additional fee * * * levied at the rate of \$72.00 per ton" for "waste and substances which are generated outside of Alabama and disposed of at a commercial site * * * in Alabama" (Pet. App. 106a). The circuit court found the Additional Fee unconstitutional as a violation of the Commerce Clause because it facially discriminates against interstate commerce in hazardous wastes (Pet. App. 85a).¹⁵

¹⁵ The court upheld the constitutionality of two other provisions of Act No. 90-326 that petitioners argued had the practical effect of requiring only the Emelle facility to bear significant economic burdens. The Alabama Supreme Court

The Alabama Supreme Court reversed that ruling; it distinguished the Additional Fee from the similar state legislation struck down in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), on the ground that the Fee serves legitimate health and safety, environmental conservation, and compensatory revenue purposes that could not adequately be served by non-discriminatory alternatives (Pet. App. 44a).¹⁶

This Court granted certiorari limited to the question of whether Alabama's Additional Fee provision violates the Commerce Clause.

SUMMARY OF ARGUMENT

This case is controlled by the convergence of established principles respecting state taxation of interstate commerce with this Court's decision in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). The Court there held that interstate waste transactions are fully subject to the Commerce Clause prohibition of discriminatory state statutes. Although respondents attempt to defend the facially discriminatory Additional Fee by asserting legitimate state environmental and health and safety concerns, those concerns can be at least as effectively addressed by non-discriminatory restrictions on the transportation and disposal of *all* hazardous waste within the State, and accordingly are insufficient to justify the treatment of out-of-state generated hazardous waste less favorably than identical in-state generated waste. Nor

affirmed these holdings, and this Court limited the grant of the petition for certiorari to consideration of the provision discussed in text.

¹⁶ Justice Houston concurred on the theory that hazardous waste is not an article of commerce protected under the Commerce Clause. Pet. App. 48a.

can the Additional Fee be upheld on the theory that it is a quarantine law that prevents traffic in noxious substances, because it is a tax, not a ban, and it is not evenhanded. Finally, because Alabama has not demonstrated that the out-of-state waste subject to the Additional Fee is significantly different from hazardous waste generated in Alabama, *Maine v. Taylor*, 477 U.S. 131 (1986), does not justify that tax.

ARGUMENT

I. THE INTERSTATE MARKET IN HAZARDOUS WASTE MANAGEMENT SERVICES IS PROTECTED BY THE COMMERCE CLAUSE

The generation of waste, including hazardous waste, is a necessary component of any economy based on manufacturing. If our nation's manufacturers are unable to dispose of their wastes in an environmentally sound and cost effective manner, they will be unable to continue to operate.¹⁷ See *Illinois v. General Electric Co.*, 683 F.2d 206, 213 (7th Cir. 1982) ("The efficient disposal of wastes is as much a part of economic activity as the production that yields the wastes as a byproduct, and to impede the interstate movement of those wastes is as inconsistent with the efficient allocation of resources as to impede the interstate movement of the product

¹⁷ Risk management is an important component of cost effective disposal of hazardous waste. To enable industry to manage risks, especially the risk of potential Superfund liability, industry must be able to obtain access to safe facilities—including centralized treatment and storage facilities that may be located in States other than those in which the waste is generated—and to limit the number of facilities to which waste is sent. Restrictions on cross-border movements of waste could effectively preclude these waste management strategies for many companies.

that yields them.”), cert. denied, 461 U.S. 913 (1983).

This Court recognized this principle in *Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978), which held that interstate waste transactions are fully subject to the Commerce Clause prohibition against discriminatory or unduly burdensome state statutes.¹⁸ That decision relies upon the purposes animating dormant commerce clause analysis to hold that New Jersey could not “isolate itself in the stream of interstate commerce from a problem shared by all.” 437 U.S. at 629. See *Wyoming v. Oklahoma*, 112 S.Ct. 789, 800-801 (1992) (relying on and quoting *Philadelphia v. New Jersey*). Cf. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) (“[The Constitution] was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.”).

That principle is at least as important to industries serving the nationwide market for hazardous waste management as it is to other industries. A national market in waste management services is necessary for the safe and efficient management of hazardous wastes. See pp. 8-10, *supra*. Arbitrarily dividing waste management along state lines would inhibit the selection of the most environmentally sound and least costly treatment and disposal option for each particular type of such waste. And Balkanizing

¹⁸ The New Jersey statute and implementing regulations, while providing a limited exception for certain shipments of hazardous wastes, banned the import of hazardous waste destined for “disposal on or in the lands of [New Jersey].” 437 U.S. at 619 n.2 (quoting regulations).

waste treatment and disposal would force the replication of facilities already existing in other States,¹⁹ at best resulting in unnecessary duplicative investments in waste facilities and at worst threatening the economic viability of both the existing and the new facilities.²⁰ See pp. 8-10, *supra*.

There is nothing unique about hazardous waste that places it outside the stream of commerce to which the dormant commerce clause applies. In *Philadelphia v. New Jersey*, this Court held that “[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset.” 437 U.S. at 622. Thus, *Philadelphia v. New Jersey* rejected the notion that the Commerce Clause distinguishes between desirable objects of trade and undesirable ones, or, as one court of appeals has

¹⁹ In that situation, States or other governmental units might be forced to subsidize the construction and operation of local disposal facilities. Moreover, the prospect of such Balkanization could be expected not only to deter the commercial construction of facilities—which could no longer rely upon a multistate market—but also to deter investment in developing new, environmentally protective waste disposal technologies.

²⁰ The effect is similar to that of a state restriction permitting local hospitals to serve only state residents. Preventing out-of-state patients from utilizing a local hospital’s expertise or specialized equipment would not only penalize those patients, but might also make it economically infeasible for the local hospital to offer some of those specialized services. If there are only a limited number of people nationwide who need a particular type of treatment, a hospital that cannot serve the entire market may not be able to purchase the specialized equipment necessary to perform that treatment. For similar reasons, fewer resources would be invested in research to develop new treatments.

termed it, between "goods" and "bads." *Illinois v. General Electric Co.*, 683 F.2d at 213.²¹

II. THE ADDITIONAL FEE VIOLATES THE COMMERCE CLAUSE

A. Alabama's Additional Fee Provision Discriminates Against Interstate Commerce in Hazardous Waste Management Services.

The federal union is built upon a presumption of free trade within a national market. *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 402 (1984). The powers given Congress to regulate interstate trade by the Commerce Clause of the Constitution, Art. I, § 8, Cl. 3, reflect this bedrock principle. And "[i]t has long been accepted that the Commerce Clause * * * also directly limits the power of the States to discriminate against interstate commerce." *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988). Such a prohibition on state laws that dis-

²¹ The rejection of such a distinction recognizes that most articles of commerce have both good and bad effects upon the State that imports them. For example, imports of automobiles may increase pollution, highway congestion, and the risks of accidents in the importing State. Cf. *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 470 (1981) (plastic, nonreturnable nonrefillable containers consume energy resources and require solid waste disposal). Although the import of waste for disposal may present health and safety concerns, it also provides a source of employment for the State. Moreover, hazardous waste is now a raw material for some industrial processes. Thus, there is no bright line difference between hazardous waste and many other commodities in the interstate market. In any event, under *Philadelphia v. New Jersey*, *supra*, a particular court's determination of what is beneficial to the importing State and what is not provides no sound basis for the definition of an article of commerce entitled to constitutional protection.

criminate against interstate commerce is necessary to prevent a "multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951).

The Commerce Clause limitation restricts state taxing powers; "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984); accord *Westinghouse Electric Corp.*, 466 U.S. at 403.²² Alabama's

²² The incompatibility of discriminatory taxes and the Commerce Clause was recognized by this Court more than one hundred years ago in *Guy v. Baltimore*, 100 U.S. 434 (1879), which invalidated a Baltimore ordinance that charged a greater wharfage fee to vessels transporting out-of-state produced goods and articles than to vessels carrying Maryland goods. The rule of decision in that case was as follows:

[N]o State can, consistently with the Federal Constitution, impose upon the products of other States * * * or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory.

100 U.S. at 439. Other than a compensating tax (see note 24, *infra*), this Court has never upheld a state tax that imposes a higher rate for interstate commerce than intrastate commerce. See, e.g., *New Energy Co. v. Limbach*, 486 U.S. 269, 280 (1988) (tax credit for ethanol produced within State or in State providing reciprocal tax credit); *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984) (tax exemption for liquor produced from plants native to State); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (taxing system including credits for most in-state natural gas uses); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977) (greater tax burden on interstate securities transactions than on similar intrastate transactions); *Hale v. Bimco Trading, Inc.*, 306 U.S. 375 (1939) (inspection fee for foreign cement).

Additional Fee provision violates this nondiscrimination principle on its face: an in-state generator can dispose of its hazardous waste in an Alabama landfill for \$25.60 per ton, while an out-of-state generator must pay an additional \$72 per ton to dispose of hazardous waste that is identical to the in-state waste in all respects except its State of origin. Pet. App. 86a, 106a. Such discrimination goes to the very heart of what the Commerce Clause prohibits.²³

B. Alabama Has Nondiscriminatory Alternatives Available to Effect its Legitimate State Purposes.

Typically, once a state tax challenged under the Commerce Clause has been found to be discriminatory, it has been struck down without further inquiry. *Westinghouse Electric Corp.*, 466 U.S. at 406-407; *Maryland v. Louisiana*, 451 U.S. 725, 760 (1981); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 337 (1977). As this Court explained in *Freeman v. Hewitt*, 329 U.S. 249, 253 (1946), discriminatory taxes are unlike police power regulation of local aspects of interstate commerce:

Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a State of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce.

Where a tax purports to protect the health and safety of the State's citizens rather than simply to

²³ Alabama's denomination of these charges as fees, rather than taxes, is irrelevant for constitutional purposes. See, e.g., *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987) (analyzing market fee as tax).

provide an additional source of revenue, it may nevertheless be appropriate to analyze that rationale to determine whether nondiscriminatory alternatives would serve as well to further it. This Court has cautioned, however, that any proffered justification for a facially discriminatory statute would be subject to "the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979); cf. *New Energy Co.*, 486 U.S. at 278-280 & n.3 (tax on certain out-of-state produced ethanol invalid despite asserted health related aim).

The State of Alabama has legitimate concerns about the disposal of hazardous wastes at the Emelle facility. The Alabama Supreme Court identified several of these concerns: protecting the health and safety of Alabama's citizens, compensating Alabama's citizens for the costs and burdens of hazardous waste disposal, conserving the State's natural resources, and reducing the overall flow of waste traveling on the State's highways. Pet. App. 44a. However, since Alabama's hazardous waste is identical to that of out-of-state generators (Pet. App. 86a), Alabama's legitimate concerns relate to the *volume* of hazardous waste disposed of within the State, not to its source. These concerns, therefore, provide no justification for treating disposal of out-of-state generated hazardous waste less favorably than in-state generated hazardous waste.²⁴

²⁴ If in-state disposers were actually paying more than out-of-state disposers for waste disposal, Alabama could properly impose a compensating tax on interstate commerce in hazardous waste that would "equalize[] previously unequal tax burdens by offsetting 'a specific tax imposed only on intrastate commerce for a substantially equivalent event.'" *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. at 287; see *Mary-*

Moreover, Alabama has several less discriminatory alternatives available to serve its legitimate state interests. The health and safety of Alabama's citizens could be served as well by imposing a cap or a per ton tax on *all* hazardous waste disposal within the State. And if Alabama objects to the *landfilling* of hazardous waste, it can stem the flow of hazardous waste into landfills either by capping the total amount of landfilled waste or by taxing the disposal of hazardous waste in landfills. See *Philadelphia v. New Jersey*, 437 U.S. at 626 (State "may pursue [its economic and environmental] ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected"); cf. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 619 (1981) (State can charge a per ton severance tax on coal even if it is borne primarily by out-of-state consumers).²⁵

land v. Louisiana, 451 U.S. at 758-759. Alabama does not, however, assert that there is a specific tax on intrastate commerce for which the statute at issue in this case would serve as a compensating tax.

²⁵ If Alabama believes that federal regulation of hazardous waste management facilities is insufficient to protect the public health and safety of Alabama's residents, it is free to adopt more stringent regulations. 42 U.S.C. 6929 ("Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by [federal] regulations."); cf. *Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390, 1397 (D.C. Cir. 1991) (upholding EPA's determination that North Carolina's statute requiring thousand-fold dilution of discharges from commercial hazardous waste treatment facilities into surface waters above public drinking water intakes is consistent with federal law). It may not be consistent with RCRA, however, for a State to ban all disposal of hazardous

A nondiscriminatory tax could also be used to compensate the State for the expense of regulating, monitoring and dealing with the adverse effects of hazardous waste disposal. See *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707, 717 (1972) (user fee for use of airport constitutional where interstate and intrastate flights subject to the same charges); *Capital Greyhound Lines v. Brice*, 339 U.S. 542, 548 (1950) (highway tax).²⁶

The Alabama Supreme Court also found that the Additional Fee would conserve the environment and the State's natural resources. Alabama's interest in conserving its landfill capacity for its own in-state generators does not justify discrimination against interstate commerce.²⁷ This Court has long held that a State cannot discriminate against out-of-state commerce as a means of reserving its natural resources for its own citizens. As the Court explained in *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 255 (1911):

If the States have such [a] power * * * Pennsylvania might keep its coal, the Northwest its

waste within its borders. See *Ensco, Inc. v. Dumas*, 807 F.2d 743, 745 (8th Cir. 1986).

²⁶ The Alabama Supreme Court suggested that a flat tax on all hazardous waste disposal was not a viable alternative in this case because "Alabama is bearing a grossly disproportionate share of the burdens of hazardous waste disposal for the entire country." Pet. App. 46a. But if a disproportionate portion of the hazardous waste disposed of in Alabama is generated out-of-state, then that same portion of a non-discriminatory tax on waste disposal would be borne by generators in other States.

²⁷ As discussed pp. 10-11, *supra*, the capacity assurance provisions of SARA are intended to assure adequate disposal sites nationwide for Alabama-generated hazardous waste.

timber, the mining States their minerals * * *. [The] influence on interstate commerce need not be pointed out * * *. If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines.

Accord, e.g., *Hughes v. Oklahoma*, 441 U.S. 322, 338 (1979) (ban on export of state minnows); *Philadelphia v. New Jersey*, 437 U.S. at 624, 626-627 (ban on out-of-state waste); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982) (ban on out-of-state sale of hydroelectric energy).

Finally, the Alabama Supreme Court justified the Additional Fee as an attempt to reduce the flow of waste traveling on the State's highways. Alabama could reduce the risks of accidents on its roads by vehicles carrying hazardous waste by imposing a nondiscriminatory per-mile tax on the use of those vehicles. Cf. *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 286 (1987) (tax that charges out-of-state trucks five times as much as in-state trucks per mile is plainly discriminatory). Alabama may also seek authorization from the Secretary of Transportation to enact stronger nondiscriminatory safety regulations for the transportation of hazardous waste. 49 U.S.C. App. 1811(b).²⁸

²⁸ Respondents assert (Hunt Br. in Opp. 12-13) that the discriminatory fee is warranted by the risk that, if the State is ultimately required to bear the costs of cleaning up the Emelle Facility, it will be unable to obtain any meaningful contribution from the out-of-state generators. But federal law provides the State with ample authority to impose the financial costs of cleaning up the Emelle Facility on the generators of the waste—both in-state and out-of-state. The

In short, Alabama has several alternatives that would serve its legitimate objectives at least as well as the Additional Fee. Just as in *Hughes v. Oklahoma*, 441 U.S. at 338, this statute "is certainly not a 'last ditch' attempt at conservation after nondiscriminatory alternatives have proved unfeasible. It is rather a choice of the most discriminatory means even though nondiscriminatory alternatives would seem likely to fulfill the State's purported legislative local purpose[s] more effectively."

III. THE ADDITIONAL FEE CANNOT BE JUSTIFIED AS A QUARANTINE LAW

This Court's cases upholding state laws that ban the import of some articles of commerce on a "quarantine" theory have no applicability here. As this Court explained in *Philadelphia v. New Jersey*, quarantine laws have withstood Commerce Clause challenges because they "prevent[] traffic in noxious articles, whatever their origin"—articles which by "their very movement risk[] contagion and other evils." 437 U.S. at 628-629. Accord *Bowman v. Chicago & N.W. Ry.*, 125 U.S. 465, 489 (1888). Alabama's Additional Fee is not a quarantine provision

Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, generally subjects petitioner, as owner and operator of the facility, and the generators of the waste to strict, joint and several liability for "all costs of removal and remedial action incurred by * * * a State." 42 U.S.C. 9607(a)(1) and (4)(A). See, e.g., *O'Neil v. Picillo*, 883 F.2d 176 (1st Cir. 1989), cert. denied, 493 U.S. 1071 (1990). Alabama state law also holds operators, generators and transporters of hazardous materials liable for cleanup of hazardous substance sites. Ala. Code §§ 22-30A-2, 22-30A-8 (1990).

because it is a tax, not a ban,²⁹ and because it is not evenhanded.

Although quarantine statutes may appear to discriminate facially against interstate commerce because they are directed at out-of-state commerce, they are in fact evenhanded because all traffic in those items is prevented. *Philadelphia v. New Jersey*, 437 U.S. at 628-629. See, e.g., *Clason v. Indiana*, 306 U.S. 439, 443 (1939) (rejecting Commerce Clause challenge to statute restricting transport of dead animals, noting that State has a similar scheme respecting in-state carcasses).³⁰ It is entirely appropriate for a court, in weighing the constitutionality of such evenhanded statutes, to employ a balancing test to determine whether the incidental effects on interstate commerce are outweighed by the dangers inherent in the movement of these commodities.³¹ *Philadelphia v. New Jersey*, 437 U.S. at 622; *Asbell v. Kansas*, 209 U.S. 251, 256 (1908).³²

²⁹ A tax cannot be justified as a quarantine since quarantined items must be destroyed immediately to protect the public health. *Philadelphia v. New Jersey*, 437 U.S. at 628-629.

³⁰ Although some of the quarantine cases do not explicitly search for an in-state equivalent to the discriminatory statutes, such a search is unnecessary where it is apparent that "[t]he hostility is to the thing itself, not to merely interstate shipments of the thing." *Illinois v. General Electric*, 683 F.2d at 214.

³¹ Although the quarantine cases predate *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), their balancing test is not unlike the approach established in that case to determine the constitutionality of a regulatory statute that is evenhanded in its application, but which incidentally burdens interstate commerce.

³² To the extent that earlier cases suggest that the items involved are not articles of commerce, they have been im-

Alabama's Additional Fee is not a quarantine statute because Alabama does not preclude the disposal of hazardous waste that is generated within its borders. As the Court explained in *Guy v. Baltimore*, 100 U.S. 434, 443 (1879):

In the exercise of its police powers, a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to the health or which would endanger the lives or property of its people. But if the State, under the guise of exerting its police powers, should make such exclusion or prohibition applicable solely to articles, of that kind, that may be produced or manufactured in other States, the courts would find no

explicitly overruled by the last fifty years of Commerce Clause jurisprudence, which has recognized the broad range of intrastate activities that can affect interstate commerce. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (returning to Chief Justice Marshall's broad definition of commerce in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *United States v. Darby*, 312 U.S. 100 (1941). The comprehensive federal regulation of hazardous waste management services is consistent with this broad view. See discussion pp. 2-7, *supra*.

This Court has repeatedly emphasized that "[t]he definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some extension of federal control or regulation" (*Hughes v. Oklahoma*, 441 U.S. at 326 n.2). Accord *Sporhase v. Nebraska*, 458 U.S. 941, 951-952 (1982); *Philadelphia v. New Jersey*, 437 U.S. at 622-623. Thus, a conclusion in this case that hazardous waste is not an article of commerce would cast doubt on the constitutional basis for all hazardous waste regulation under RCRA.

difficulty in holding such legislation to be in conflict with the Constitution of the United States.

See *National Solid Wastes Mgmt. Ass'n v. Alabama Dep't of Env'tl Mgmt.*, 910 F.2d 713, 719 (11th Cir. 1990) (ban on transport of hazardous waste into Alabama from some, but not all, States suggests that hazardous waste "is not inherently too dangerous to be a product in commerce"); *Illinois v. General Electric Corp.*, 683 F.2d at 215-216 (in striking down state ban on the import of nuclear waste, noting that State allowed in-state nuclear waste to be shipped and stored within the State).

Although Alabama claims that it is motivated by health and safety concerns, its higher fee is directed at wastes that come from out of State, not at those which are intrinsically more dangerous for some reason. A quarantine rationale provides no justification for differential treatment of wastes based solely on their State of origin, absent any difference in degree of dangerousness related to their out-of-state origin.³³

Alabama's reliance upon this Court's decision in *Maine v. Taylor*, 477 U.S. 131 (1986), to justify the

³³ In *Philadelphia v. New Jersey*, the Court noted that in the quarantine situation, movement of the quarantined item was considered unsafe, and distinguished the New Jersey statute, which was concerned with evils after disposal, not during transportation. 437 U.S. at 629. In the instant case, the Alabama Supreme Court relied on transportation risks as a justification for Alabama's Additional Fee statute, Pet. App. 44a, but if transportation risks were its true concern, Alabama would place a tax on all transportation of hazardous waste, not just movement from out of State to in-state disposal sites (which may involve shorter transportation distances within Alabama than occur in many in-state shipments).

differential treatment of out-of-state generated hazardous waste is unwarranted. *Maine v. Taylor* is not, in fact, a quarantine case. Rather than upholding a state law that banned import of an item that would be similarly treated within Maine, i.e., a law against the import of diseased baitfish, it upheld a state law that banned the import of all baitfish because out-of-state baitfish are, in fact, different from in-state baitfish. *Id.* at 148, 151-152. Thus, *Maine v. Taylor*, *supra*, follows the logic of the rule set forth in *Philadelphia v. New Jersey*, 437 U.S. at 629, that out-of-state articles of commerce must be treated the same as in-state articles of commerce when they are indistinguishable. The converse of that rule, as demonstrated in *Maine v. Taylor*, *supra*, is that the comparable treatment rule does not apply when the articles are *dissimilar*. Since the facts in *Maine v. Taylor* demonstrated that the out-of-state baitfish were different, and that the difference posed a substantial threat to the State's natural resources, they could be banned absent a less discriminatory means of protecting Maine's environment. 477 U.S. at 140. In contrast, here the trial court found that out-of-state generated hazardous waste is the same as Alabama-generated hazardous waste (Pet. App. 86a), and no one has disputed that finding. Alabama's discriminatory provision is accordingly unconstitutional.

Respondents cite *Maine v. Taylor* for the proposition that state measures that seek to protect public health, safety, or the environment are constitutional, in contrast with those that attempt to place in-state interests in a position of commercial advantage. Hunt Br. in Opp. 11; Sizemore Br. in Opp. 9-10. The Court made no such distinction in that case. While it did recognize that state laws that amount to simple

economic protectionism have been subject to a virtual per se rule of invalidity, 477 U.S. at 148, it also reconfirmed the unconstitutionality of "laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade," noting that "the evil of protectionism can reside in legislative means as well as legislative ends." *Id.* at 148 n.19, quoting *Philadelphia v. New Jersey*, 437 U.S. at 626. See also *Wyoming v. Oklahoma*, 112 S. Ct. at 801. In upholding the ban on baitfish imports at issue in *Maine v. Taylor*, the Court relied in part on the lower court findings that the State's justifications for the statute were legitimate, 477 U.S. at 148-149, but that did not end the inquiry. Despite the proper motivations of the legislators, the Court subjected the Maine statute to the strict scrutiny test, and found it constitutional only after determining that Maine's "legitimate local purposes * * * could not adequately be served by available nondiscriminatory alternatives." *Id.* at 151.

Thus, *Maine v. Taylor* is fully consistent with the holding and rationale of *Philadelphia v. New Jersey*. Both cases confirm the unconstitutionality of Alabama's Additional Fee, which serves no legitimate state purpose that could not adequately be served by available nondiscriminatory alternatives.

CONCLUSION

For these reasons, the judgment of the Alabama Supreme Court should be reversed.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC., PETITIONER

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA;
ALABAMA DEPARTMENT OF REVENUE; and JAMES
M. SIZEMORE, JR., COMMISSIONER OF THE ALABAMA
DEPARTMENT OF REVENUE, RESPONDENTS

On Writ of Certiorari to the
Supreme Court of Alabama

BRIEF FOR
AMERICAN TRUCKING ASSOCIATIONS, INC.
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a tax that discriminates on its face against interstate commerce violates the Commerce Clause.

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**BRIEF FOR
AMERICAN TRUCKING ASSOCIATIONS, INC.
AS AMICUS CURIAE SUPPORTING PETITIONER**

INTEREST OF THE AMICUS CURIAE

American Trucking Associations, Inc. (ATA) is the national trade association of motor carriers, state trucking associations, and national trucking conferences, created to promote and protect the interests of the trucking industry. A significant proportion of ATA's members transport hazardous waste or other hazardous materials in interstate commerce. They are therefore affected directly by discriminatory taxes such as the one at issue in this case. Indeed, ATA has successfully challenged under the Commerce Clause a state hazardous materials transportation fee that discriminated against interstate commerce,

relying on some of the very arguments rejected by the Supreme Court of Alabama in this case. *ATA v. Secretary of State*, 595 A.2d 1014 (Me. 1991). Several similar challenges are now pending against fees imposed by other states. *ATA v. New Hampshire*, No. 89-E-00405-B (N.H. Super. Ct., Sept. 27, 1989) (escrow order); *ATA v. Nessen*, No. C.A. 91-7048A (Mass. Super. Ct., filed Oct. 21, 1991); *ATA v. Cowan*, No. TX91-01608 (Ariz. Tax Ct., filed Nov. 27, 1991).

Moreover, ATA and its members frequently—and often successfully—challenge other types of state taxes on Commerce Clause grounds. *E.g.*, *ATA v. Scheiner*, 483 U.S. 266 (1987); *ATA v. Goldstein*, 541 A.2d 955 (Md. 1988); *Kentucky v. ATA*, 746 S.W.2d 65 (Ky. 1988). ATA accordingly has a strong interest in the legal standards governing such actions.¹

INTRODUCTION AND SUMMARY OF ARGUMENT

The Alabama waste disposal tax at issue in this case discriminates on its face against interstate commerce. The tax applies only to waste generated outside Alabama. Waste generated within the State is entirely exempt from the tax. A long line of decisions invalidating facially discriminatory state taxes (*e.g.*, *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984); *I.M. Darnell & Son v. City of Memphis*, 208 U.S. 113 (1908); *Guy v. City of Baltimore*, 100 U.S. 434 (1880)), as well as this Court's decision in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), leaves no doubt that such facial discrimination

¹ Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. See Sup. Ct. R. 37.3.

against interstate commerce in waste violates the Commerce Clause.

This brief discusses two aspects of the Alabama Supreme Court's reasoning that are particularly troubling. First, that court concluded that discrimination against interstate commerce does not violate the Constitution when the state's purpose is to protect public health, safety, and the environment. If adopted by this Court, this "exception" would swallow the Commerce Clause's antidiscrimination principle.

A vast number of substances can be characterized as threatening public health or the environment. Indeed, pursuant to his authority to regulate transportation of hazardous substances, the Secretary of Transportation has designated more than 2,000 commodities as "hazardous." The list includes such items as motor vehicles, nail polish, and mothballs. Under the Alabama Supreme Court's rationale, discriminatory taxes or regulations would presumably be permissible with respect to all of these products. That would result in the precise sort of economic warfare among the states that the Commerce Clause was expressly intended to prevent.

Second, the Alabama Supreme Court's analysis points up a more general problem in Commerce Clause litigation in the lower courts. Although this Court has never upheld a facially discriminatory tax against a Commerce Clause challenge (other than taxes found to be "compensatory" and therefore nondiscriminatory), lower courts are expending large amounts of time and resources considering whether such taxes may be justified on the ground that they are the least discriminatory means of promoting some legitimate governmental interest. The Court should make clear that in the context of facially discriminatory

taxes, as opposed to regulations, this inquiry is unnecessary. Alternatively, the Court should point out that only in an extremely rare case will such a facially discriminatory tax survive Commerce Clause scrutiny.

ARGUMENT

THE DISCRIMINATORY \$72 TAX VIOLATES THE COMMERCE CLAUSE

The unconstitutionality of Alabama's facially discriminatory tax is, we submit, indisputable under this Court's Commerce Clause decisions invalidating state tax laws that discriminate on their face against interstate commerce. In addition, it is impossible to distinguish *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), which expressly held that the Commerce Clause bars a state from discriminating in favor of in-state waste and against interstate waste. That decision, which has been interpreted by every lower court but the Alabama Supreme Court to invalidate facially discriminatory statutes analogous to the \$72 tax (see Pet. 15-17), plainly requires reversal of the decision below.

Rather than repeating petitioner's explanation of the applicability of *City of Philadelphia*, we focus here on two aspects of the Alabama Supreme Court's reasoning that have broad implications for this Court's Commerce Clause jurisprudence. First, we address the lower court's apparent conclusion that a state has greater authority to discriminate against interstate commerce if its action has some link to protection of public health and safety. Second, we explain why the Court should take this occasion to clarify the legal standard that applies in determining whether a facially discriminatory tax violates the Commerce Clause.

A. Commerce Clause Protection For Goods That Move In Interstate Commerce Should Not Be Limited On The Basis Of A Particular State's View Of The "Dan- gerousness" Of The Goods.

The principal ground for the Alabama Supreme Court's decision is that a state may discriminate against interstate commerce if its motive is to protect the public health and safety. Repeatedly referring to the public health and safety risks that it believed to be posed by hazardous waste (see Pet. App. 44a, 45a, 46a), the court concluded that Alabama's interest in protecting against those risks justified the discriminatory tax (*id.* at 44a-45a). Indeed, the court all but acknowledged (*id.* at 41a-42a) that state action motivated by a different state interest—such as the desire to protect local industry—would have been constitutionally impermissible.

Although the majority of the court below purported to assume that hazardous waste constitutes an article of commerce protected by the Commerce Clause (Pet. App. 41a), one Justice did conclude that, because of the potential threat to the environment, hazardous waste is not an article of commerce entitled to Commerce Clause protection (*id.* at 48a).² Of course, both approaches lead to precisely the same result: they permit states to justify virtually any measure that discriminates against interstate commerce simply by invoking an interest in protecting public health and safety against risks supposedly arising from the particular substance.

Both of these arguments were considered and rejected by this Court in *City of Philadelphia*. In holding that solid waste is an article of commerce pro-

² Respondents apparently intend to press the latter argument before this Court. Hunt Br. in Opp. 11-13.

tected under the Commerce Clause, the Court expressly rejected the contention that “innately harmful articles ‘are not legitimate subjects of trade and commerce,’” holding instead that “[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset.” 437 U.S. at 622 (citation omitted). And the Court specifically held that the subjective motivation that led to enactment of the discriminatory statute is constitutionally irrelevant: “it does not matter whether the ultimate aim of [the statute] is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution * * *. But whatever New Jersey’s ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.” *Id.* at 626-627. *See also New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 279 n.3 (1988) (goal of protecting public health cannot justify “patent discrimination against interstate commerce”).

The Alabama Supreme Court’s position is more than just legally insupportable, however. It also would produce dire consequences, fostering the very “anarchy and commercial warfare between the states” that the Commerce Clause was intended to prevent. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949). *See also Hughes v. Oklahoma*, 441 U.S. 322, 325-326 (1979) (the Framers believed that, “in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation”). Accepting the proposition underlying the de-

cision below—that the states are free to discriminate against any out-of-state commodity that can reasonably be classified as harmful to public health, safety, or the environment—would effectively eliminate Commerce Clause protection for a very large portion of the Nation’s interstate commerce, opening the door to a crazy quilt of discriminatory restrictions that would paralyze interstate commerce.

Hazardous waste is not the only substance moving in interstate commerce that poses an arguable threat to public health and safety. As part of his authority to promulgate regulations for the safe transportation of “hazardous materials,” the Secretary of Transportation is authorized to designate materials as “hazardous.” 49 U.S.C. App. § 1804(a)(4)(B)(i). The Secretary has determined that more than 2,000 materials fall within this classification. *See* 49 C.F.R. § 172.101. And because the Secretary has identified many hazardous materials generically (*i.e.*, “Air conditioning machine”), and many others without specifying the myriad forms in which they may exist (*i.e.*, “Di(4-tert-butylcyclohexyl) peroxydicarbonate, * * * n.o.s.”³), this figure under-represents the actual number of commercial articles deemed hazardous.

The volume of traffic in hazardous materials, much of it interstate, is enormous. The federal government estimated that over 1.5 billion tons of hazardous materials were transported in the United States during 1982 (the last year for which data are available). *Transportation of Hazardous Materials* 3-4, U.S. Congress, Office of Technology Assessment, OTA-SET-304 (Government Printing Office, July 1986). More than 60% of that amount was transported overland

³ “N.o.s.” means “not otherwise specified.”

by over 467,000 trucks travelling 1.6 billion truck-miles (*id.* at 4, 49).⁴ Furthermore, a significant amount of hazardous materials transportation is interstate (see *id.* at 22), and the principal routes for transport are the interstate highways (*id.* at 111). These facts establish beyond any doubt the interstate nature of the transportation of hazardous materials.

The materials that the Secretary of Transportation has designated as hazardous touch an incredibly broad range of commercial activities. As one might expect, many of the materials designated as hazardous are chemicals. But the list encompasses a wide variety of other substances. From insecticides to motor vehicles, from medicines to mothballs, and from refrigerators to cigarettes, nail polish, batteries and paint, the list of hazardous materials reaches deeply into everyday business and consumer life. See 49 C.F.R. § 172.101. Of the vast amount of hazardous materials that are transported interstate daily, *less than 1% is hazardous waste. Transportation of Hazardous Materials* at 41 n.*. Yet the health concerns advanced to block hazardous waste at Alabama's borders could easily be invoked to block any other hazardous material.

And there is no reason that the states would be limited to articles designated as "hazardous" under federal law. Here, for example, Alabama's discriminatory tax applies to any type of waste—hazardous or nonhazardous—that is disposed of at a commercial

⁴ The 1982 statistics reflect a 43% growth in fleet size and a 23% growth in truck miles from data compiled in 1977. *Transportation of Hazardous Materials, supra*, at 49. It is reasonable to believe that the figures for 1991 would far outstrip those contained in the 1982 survey.

hazardous waste disposal facility. As long as a state could defend as rational the determination that the commodity in question poses some threat to public health or the environment, it presumably would be entitled to discriminate against interstate commerce in that commodity.

Many ordinary commodities—such as power saws, nails, kitchen knives, thermometers (which contain mercury), mirrors, and drinking glasses—could be characterized as posing a danger to public health and safety if spilled during transportation or used incorrectly by the public. Under the Alabama Supreme Court's rationale, a state would presumably be free to impose a discriminatory tax on any of these commodities.

Commercial warfare between the states is inevitable if a state may discriminate against interstate commerce by restricting an out-of-state hazardous material while countenancing the same material if it is generated within the state. States could easily favor local producers or users of "hazardous" materials, under the guise of health and safety concerns, by restricting the importation of those materials from other states on the ground that those materials pose "special" risks to its own citizens. For example, a state could prohibit the importation of cement (a hazardous material) from neighboring states while allowing its own cement makers to operate unfettered. The possibilities for protectionism and disruption of interstate commerce would be endless.

In short, the decision of the Alabama Supreme Court should be reversed not only because it flatly contradicts established Commerce Clause precedent, but also because it would destroy the national econ-

omy. States could exploit any such loophole in the Clause's antidiscrimination principle to impose a disparate burden on any of the thousands of hazardous materials that are transported interstate. The resulting web of discriminatory, protectionist legislation would yield exactly the kind of economic balkanization condemned by the Commerce Clause. Because the step taken by the Alabama Supreme Court portends a catastrophic fall down the slippery slope of protectionism, this Court should refuse to carve out an exception to the Commerce Clause for "hazardous" goods.

B. This Court Should Make Clear That A Tax That Discriminates On Its Face Against Interstate Commerce Will Pass Constitutional Muster Only In Very Unusual Circumstances.

State laws that discriminate on their face against interstate commerce almost always violate the Commerce Clause. Indeed, this Court has characterized the Clause as erecting "a virtual[] *per se* rule of invalidity" with respect to such statutes. *City of Philadelphia*, 437 U.S. at 624. A court must engage in "the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979). The state's burden of justification is "high." *New Energy Co.*, 486 U.S. at 278. *Accord*, *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 (1992).

Aside from the few cases in which the Court has upheld a facially discriminatory tax on the ground that it compensates for a tax applicable solely to interstate commerce, and therefore is not in substance discriminatory (see, e.g., *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937)), we are not aware of any

case in which the Court has upheld a tax that discriminates on its face against interstate commerce. Rather, such statutes are routinely invalidated. See, e.g., *New Energy Co.*, *supra*; *Tyler Pipe Indus., Inc. v. Washington State Dep't of Rev.*, 483 U.S. 232 (1987); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977); *I.M. Darnell & Son v. City of Memphis*, 208 U.S. 113 (1908); *Walling v. Michigan*, 116 U.S. 446 (1886); *Guy v. City of Baltimore*, 100 U.S. 434 (1880); *Welton v. Missouri*, 91 U.S. 275 (1876).

Prior to its recent decision in *New Energy Co.*, this Court typically held facially discriminatory taxes invalid under the Commerce Clause without inquiring whether the state could somehow justify the discrimination. In *New Energy Co.*, the Court considered—apparently for the first time in the context of a facially discriminatory tax (as opposed to a facially discriminatory regulation)—whether the discrimination against interstate commerce might be justified because the tax "advance[d] a legitimate local purpose that [could not] be adequately served by reasonable nondiscriminatory alternatives" (486 U.S. at 278). The Court held in *New Energy Co.* that the state had not met that standard. As we have discussed, the same conclusion is warranted in this case.

We question whether this inquiry is appropriate in the context of facially discriminatory taxes. A state will virtually always have an available nondiscriminatory alternative: a facially neutral tax. If a state is truly motivated by a legitimate purpose, rather

than by the desire to discriminate against out-of-state goods, it should be able to draft its tax statute by setting forth the characteristics of the class of goods subject to the tax. There simply is no reason to allow the states the option of framing a tax in discriminatory terms (where the statute does not satisfy the exemption for compensatory taxes discussed above).

This conclusion is supported by the practical consequences resulting from application of the *New Energy Co.* standard in the tax context. Pointing to the inquiry undertaken by this Court in that case, state and local governments have argued that even facially discriminatory taxes may not be struck down under the Commerce Clause without lengthy and expensive trials. Thus, in this case, Alabama persuaded the trial court to deny petitioner's summary judgment motion and conduct a four-day trial on the ground that there was a factual issue as to whether the discrimination could be justified under the *New Energy* test. (The court found no justification for the discrimination. Pet. App. 86a-88a.) This approach drains the resources of the parties and of the judicial system, and, because it may tend to encourage an open-ended inquiry into the state's reasons for enacting the statute, increases the chances that an unconstitutionally discriminatory law will erroneously be upheld. That is precisely what happened here.

This Court therefore should consider eliminating the inquiry into potential justifications in the context of facially discriminatory taxes. Alternatively, the Court should clarify the governing legal standard by expressly reminding the lower courts that facially discriminatory taxes almost always violate the Com-

merce Clause. That guidance will enable lower courts to more easily and accurately adjudicate challenges to state taxes under the Commerce Clause.

CONCLUSION

The judgment of the Supreme Court of Alabama should be reversed.

Respectfully submitted.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC.,
Petitioner,

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA; ALA-
BAMA DEPARTMENT OF REVENUE; and JAMES M. SIZE-
MORE, JR., COMMISSIONER OF THE ALABAMA DEPART-
MENT OF REVENUE, *Respondents.*

On Writ of Certiorari to the
Supreme Court of Alabama

BRIEF OF AMICI CURIAE
HAZARDOUS WASTE TREATMENT COUNCIL
AND THE NATIONAL SOLID WASTES MANAGEMENT
ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the State of Alabama may discriminate against interstate commerce by placing a \$72.00 per ton "Additional Fee" on hazardous waste generated *outside* that state, disposed of within the state.

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IN THE
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OCTOBER TERM, 1991

No. 91-471

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Petitioner,
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GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA; ALA-
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**On Writ of Certiorari to the
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**BRIEF OF AMICI CURIAE
HAZARDOUS WASTE TREATMENT COUNCIL
AND THE NATIONAL SOLID WASTES MANAGEMENT
ASSOCIATION IN SUPPORT OF PETITIONER**

INTEREST OF AMICI CURIAE

The Hazardous Waste Treatment Council ("Treatment Council") is a national not-for-profit trade association having more than 60 member firms with operations in forty-eight states.¹ Its members serve thousands of large and small customers in those states, providing services, equipment and technology for the treatment, storage, recycling and disposal of hazardous waste generated by industry and agriculture. The services provided by Treat-

¹ Petitioner Chemical Waste Management, Inc. ("CWM") is not a member of the Treatment Council.

ment Council members encompass the full range of hazardous waste management techniques, using both established and emerging technologies. These include incineration and other forms of thermal destruction, reclamation, biological and chemical treatment, land disposal after pretreatment, and hazardous site cleanups.² Treatment Council members depend upon Petitioner's Emelle, Alabama disposal facility in various ways, and are directly affected by the Alabama legislation at issue here.

The National Solid Waste Management Association ("NSWMA") is a not-for-profit trade association with a membership composed of companies in the waste management business. NSWMA consists of over 2,700 members whose activities encompass the entire spectrum of waste management services.³ Pursuant to its bylaws, NSWMA is charged with protecting the interests of the waste management industry in the public and regulatory arena.⁴ In particular, a fundamental goal of NSWMA's advocacy program, as approved by its Board of Directors, is "to insure adequate waste management capacity in North America." Members of NSWMA are engaged in the business of transporting and disposing of hazardous waste in Alabama and in other states. Several of NSWMA's members, including Petitioner, have transported hazardous waste into Alabama for disposal within that state.

² The Treatment Council's Articles of Incorporation provide that among its purposes is:

To promote the protection of the environment through the adoption of environmentally sound procedures and methods of destroying and treating hazardous wastes and the proper management of residues.

³ Petitioner CWM is a member of NSWMA.

⁴ The By-Laws of NSWMA direct it to:

assist governments, public agencies and private organizations in the development, refinement and . . . acceptance of new and approved practices and policies, including laws and regulations in the waste management field

The Alabama legislation at issue here has a direct and adverse impact on the waste transportation, treatment or disposal activities of these members.

By erecting a "barrier at the border" to the flow of commerce into the state, the tariff on imports at issue here limits the ability of members of both the Treatment Council and NSWMA to make efficient use of the Nation's limited resources for waste treatment and disposal.⁵

STATEMENT

Amici adopt petitioner's statement of the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

For nearly 200 years, it has been understood that the national union which is the United States is, in part, an economic union, premised upon free trade between and among the citizens, businesses, farmers and industries of the various constituent states. The companies that are engaged in the important business of treating and disposing of the waste products generated by business, industry and agriculture in every state are a vital element of that national economic union.

For reasons of economy, efficiency and environmental protection, hazardous waste is frequently transported across state boundaries.⁶ Economies of scale, market forces, geologic and other advantages naturally affect the

⁵ The parties' letters of consent have been filed with the Clerk pursuant to this Court's Rule 37.3.

⁶ Because of the multitude of hazardous wastes produced in our society, no single technology can treat or dispose of *every* type of waste. As a result, if waste is to be disposed of properly, the shipment of waste across state borders is efficient and necessary. See generally *National Solid Wastes Mgt. Ass'n v. Alabama Dep't of Env'tl. Mgt.*, 910 F.2d 713, 717 (11th Cir. 1990), *modified on other grounds*, 924 F.2d 1001 (11th Cir.), *cert. denied*, 111 S. Ct. 2800 (1991); see also *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781 (4th Cir. 1991).

location and choice of hazardous waste treatment and disposal facilities, including the dispersion of facilities among the states. No single state—including Alabama—possesses within its borders the means to treat and dispose of *every* type of hazardous waste that its own residents and industry generate.⁷ It is ordinarily far less costly—and more desirable for safety reasons—to move hazardous waste to the nearest, most technically advanced and safest disposal facility *across state lines*, than it is to transport waste greater distances within the same state in which it was generated. As the market has developed, therefore, hazardous waste regularly crosses state lines to take advantage of a competitive and efficient national market in the provision of treatment and disposal services.⁸ With

⁷ A 1989 study prepared for the U.S. Environmental Protection Agency analyzed waste management “flow” in the South-Central states (which includes Alabama). That comprehensive study demonstrated that: (1) no single state in that region has within its borders sufficient “capacity” to treat and dispose of *all* types of hazardous waste; and (2) hazardous waste flows both *out of* and *into* each of those states. For example, because Alabama does not have an “aqueous treatment” facility, industry located in that state must arrange for aqueous wastes to be shipped to Tennessee or some other state for proper treatment and disposal. See *National Solid Wastes Mgt. Ass’n v. Alabama Dep’t of Env’tl. Mgt.*, 910 F.2d at 717 n.5; see also *Generation and Capacity: A Profile of Hazardous Waste Management in EPA Region IV* (Feb. 1989).

⁸ Data provided to the U.S. Environmental Protection Agency by each state, pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. § 9604(c)(9) (1988) (discussed below), demonstrates that the national market for the treatment and disposal of hazardous waste is *necessarily* integrated and interdependent because: (1) every state has agriculture and industry which *generate* a variety of such wastes; (2) EPA has established extensive treatment standards for *hundreds* of types of hazardous waste and hazardous waste mixtures; (3) there are approximately 19 different treatment *technologies* available to accommodate the health and safety requirements unique to such wastes; (4) the *capital costs* for constructing and operating such technologies are high; and (5) as noted above, no single state has within its borders the full range or necessary *capacity* to treat and/or dispose of every type of waste. Thus, busi-

nesses and citizens located in almost every single state both export and import some hazardous waste for treatment and disposal. See *Interchange of Hazardous Waste Management Services Among States*, Environmental Information, Ltd. (Dec. 1990).

respect to the treatment and disposal of hazardous waste, the states—or, more precisely, the businesses, industries, farms and citizens located in each state—truly are, and should be, interdependent.

The existence of a national market meets a very particular national need. As noted above, interstate transportation is necessary because it is not economically efficient or feasible to build treatment and disposal facilities capable of dealing with every type of waste in every state.⁹ Moreover, an open national market, in which the providers of services have access to potential customers throughout the nation, contributes to the development of innovative technologies and advanced facilities that can best deal with the growing national problem of hazardous waste. Technological development and capital investment—vital to meeting the uniformly acknowledged national need for increased capacity for safe treatment and disposal—are restrained by imposing artificial, political limits on the markets that any particular facility is permitted to serve.¹⁰ The tariff at issue here creates precisely that type of limit.

More immediately, the tariff effectively deprives the citizens and businesses of other states of a resource—like other treatment and disposal services offered by amici—now urgently needed to dispose of certain types

nesses and citizens located in almost every single state both export and import some hazardous waste for treatment and disposal. See *Interchange of Hazardous Waste Management Services Among States*, Environmental Information, Ltd. (Dec. 1990).

⁹ For example, Petitioner’s disposal facility at Emelle, Alabama (which is the subject of this case), is one of only two facilities east of the Mississippi River that are permitted (under federal safety standards) to accept hazardous waste containing polychlorinated biphenyls (“PCBs”).

¹⁰ See, e.g., 42 U.S.C. § 6902(a) (1988); H.R. Rep. No. 1133, 98th Cong., 2d Sess. 80 (1984); 129 Cong. Rec. H8896-97 (daily ed. Oct. 31, 1983).

of waste. At a time when the nation vitally needs cost-effective outlets for disposal and treatment of its waste products, Alabama has elected to artificially price such services for *imported* waste out of the reach of most potential users of the Emelle facility. In the short term, this tariff effectively will price out of the market a facility vital to the safe and efficient disposal of hazardous waste, an action which will lead to the increased illegal and unsafe "dumping" of hazardous waste.

Specifically, Alabama has enacted a tariff that imposes a \$72.00 per ton "Additional Fee" on waste imported into that state for safe treatment and disposal. By imposing this discriminatory tax—which concededly is designed to limit out-of-state customers' use of Petitioner's Emelle disposal facility—Alabama seeks "to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978). As discussed below, Alabama's effort to impose this barrier at its border strikes at the heart of the Commerce Clause, which prohibits any state from placing its parochial interests above those of the national union by discriminating against and restricting the flow of interstate commerce. See *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989).

Unfortunately, this is not the first of Alabama's initiatives in this field to come before the federal courts. For example, in 1988, Alabama filed suit against the United States Environmental Protection Agency ("EPA") to halt the cleanup of an abandoned hazardous waste site in Texas because the waste was to be disposed of at the Emelle facility. See *Alabama v. United States EPA*, 871 F.2d 1548 (11th Cir.), *cert. denied*, 431 U.S. 991 (1989). Although it dismissed the case on standing and jurisdictional grounds, the Eleventh Circuit noted that "[t]o the extent plaintiffs . . . assert injury based on the out-of-state nature of these wastes, the Supreme Court has already held that the commerce clause bars such a distinc-

tion." *Id.* at 1555 n.3 (citing *Philadelphia v. New Jersey*, 437 U.S. 617). Alabama next attempted, in 1989, to restrict the movement of waste in interstate commerce by enacting Ala. Act No. 89-788 (the "Holley Bill") (codified at Ala. Code § 22-30-11(b)). That law barred any commercial hazardous waste disposal facility located in Alabama (*i.e.*, Petitioner's Emelle facility) from treating or disposing of hazardous waste generated outside Alabama if the state in which the waste was generated did not satisfy certain criteria specified by Alabama. This blacklisting law, which "distinguish[ed] among wastes based on their origin, with no other basis for the distinction," was held to violate the Commerce Clause. *National Solid Wastes Mgt. Ass'n v. Alabama Dep't of Env'tl. Mgt.*, 910 F.2d 713, 720 (11th Cir. 1990).

Having been rebuffed twice, Alabama next set up a restriction on the import of wastes by use of a tariff¹¹ that might only be challenged in the state courts.¹² Nonetheless, the state trial court held that "the Additional Fee facially discriminates against waste generated in States other than Alabama," Appendix to Petition for Certiorari 85a, and following the principles announced by this Court, struck down the tariff under the Commerce Clause. The Alabama Supreme Court, however, reversed, concluding that the Additional Fee was constitutional.

The decision of the Alabama Supreme Court was wrong. Under the long-standing jurisprudence of this court, the unconstitutionality of the discriminatory "Additional Fee" is both patent and unjustified. Indeed, Alabama's tariff on out-of-state waste represents the type of naked discrimination against the shipment of goods into a state that this Court repeatedly has ruled is "virtually *per se*"

¹¹ Ala. Act No. 90-326 (1990) (codified at Ala. Code § 22-30B-1.1 *et seq.*).

¹² Pursuant to the Tax Injunction Act, 28 U.S.C. § 1341 (1988), constitutional cases challenging state tax laws ordinarily are brought in the state courts.

invalid under the Commerce Clause. *Philadelphia v. New Jersey*, 437 U.S. at 624. Of course, Alabama (like any other state) always is free to adopt and implement *bona fide* health and safety regulations to ensure proper treatment and disposal of these wastes. But the discrimination embodied in the \$72.00 Additional Fee cannot be justified by any legitimate local purpose that *only* can be served by discriminating against interstate commerce.

Amici submit that this Court should not only reject the Additional Fee, but do so in the clearest possible terms. While nearly everyone recognizes the urgent need to safely manage hazardous waste, and to create facilities for that purpose, everyone likewise appears to prefer that the waste be treated and disposed of, and the facilities constructed, in some *other* state. Thus, Alabama's effort to bar the entry of these wastes reflects a "syndrome," sometimes referred to as "NIMBY" ("not in my backyard"), widely associated with the treatment and disposal of hazardous waste. Because a vote against the importation of *out-of-state* waste is an exceptionally easy vote for a state lawmaker to cast—there being no significant constituency *within* the state to protect the "out-of-staters"—there always exists the temptation to enact these kinds of laws. That temptation is magnified when other states pass similar laws because every time a state closes *its* borders to the importation of waste, it shifts the burden to other states to find some means of treating or disposing of those wastes. This, in turn, impels those states to retaliate.

Under the regime established by this Court's Commerce Clause jurisprudence, however, individual states are not in the business of correcting and regulating perceived imbalances in the flow of interstate commerce. If any legislative body is to "interfere" with such commerce, that body is Congress as the representative of the *national* interest. As shown below, the circumstances presented by this case demonstrate that recourse to Congress,

and several federal statutes, rather than self-help, is the only permissible route for a state believing itself "injured" by the flow of commerce from other states. Under the federal regulatory regime, federal regulators have both the authority and the obligation to redress the "imbalances" about which Alabama complains.

ARGUMENT

I. THE \$72.00 ADDITIONAL FEE IS A *PER SE* VIOLATION OF THE COMMERCE CLAUSE BECAUSE IT FACIALLY DISCRIMINATES AGAINST INTERSTATE COMMERCE

This Court has held that the Commerce Clause (U.S. Const. art. I, § 8, cl. 3) reflects:

a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979). This provision thus ensures "that the conduct of individual States does not work to the detriment of the Nation as a whole, and thus ultimately to all of the States." *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 8 (1986); see also *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 446 (1827); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 224-25 (1824) (Johnson, J., concurring).

The creation of a single national market went hand-in-hand with the establishment of a national political union. When Alexander Hamilton posed the question: "what inducements could the States have, if disunited, to make war upon each other?" (*The Federalist* No. 7, at 60 (Mentor ed., 1961)), his answer, in part, was that:

Competitions of Commerce would be [a] fruitful source of contention Each State, or separate

confederacy, would pursue a system of commercial policy peculiar to itself. This would occasion distinctions, preferences, and exclusions, which would beget discontent. . . . The infractions of these regulations, on one side, the efforts to prevent and repel them, on the other, would naturally lead to outrages, and these to reprisals and wars.

Id. at 62-63. See also *Federalist* No. 6, at 54 (listing “rivalships and competitions of commerce” among “[t]he causes of hostility among nations”). Hamilton expanded on this concern in *Federalist* No. 22, explaining that:

The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, *if not restrained by a national control*, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy.

Id. at 144-45 (emphasis added). Similarly, James Madison identified the Commerce Clause among the powers “which provide for the harmony and proper intercourse among the States,” explaining that leaving regulation of commerce to individual states “would nourish unceasing animosities, and not improperly terminate in serious interruptions of the public tranquility.” *Federalist* No. 42, at 267, 268.¹³

¹³ Madison argued that “it is very certain that [the Commerce Clause] grew out of the abuse of the power by the importing States in *taxing* the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves.” 3 *The Records of the Federal Convention of 1787*, at 478 (M. Farrand ed., 1937) (letter from J. Madison to J.C. Cabell, Feb. 13, 1829) (emphasis added). See also *id.* at 547-48 (Madison’s Convention notes indicating that “want of a general power over Commerce . . . engendered rival, conflicting and angry regulations”). See also *Federalist* No. 22, at 144 (Hamilton explaining that the absence of federal supervision over commerce “has already operated as a bar

In sum, discrimination against, and state regulation of, interstate commerce were seen as a source of disharmony and discord working against the establishment of a strong and cohesive national union. Over the last 200 years, the *absence* of economic warfare between the states (and, but for the Civil War, the relative harmony of the Union) is a testament to this Court’s early decisions vesting the federal judiciary with the “national control” necessary to keep the states from themselves engaging in the direct and discriminatory regulation of interstate commerce, preserving that sphere of activity exclusively to Congress.¹⁴

A. The Alabama Tariff Is *Per Se* Invalid Because It Discriminates Against Out-Of-State Waste Solely On The Basis Of Its Origin

Under the Commerce Clause, no state is permitted to discriminate against interstate commerce. See generally *Healy*, 491 U.S. 324; *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988); *Maine v. Taylor*, 477 U.S. 131 (1986); *Hughes v. Oklahoma*, 441 U.S. 322. As a result, state laws that discriminate against interstate commerce are “routinely” held invalid. *New Energy*, 486 U.S. at 274. The cases of this Court are clear that state laws drawing distinctions among articles of commerce “based solely on its origin” are subject to a “‘virtually *per se* rule of invalidity.’” *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 (1992) (quoting *Philadelphia v. New Jer-*

to the formation of beneficial treaties with foreign powers, and has given occasions of dissatisfaction between the States.”)

¹⁴ This Court long has held that the Constitution precludes certain forms of state regulation. See, e.g., *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1851) (“[w]hatever subjects of this [commerce] power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress”); see also *Leisy v. Hardin*, 135 U.S. 100, 109-10 (1890); *Gibbons*, 22 U.S. (9 Wheat.) at 209.

sey, 437 U.S. at 624); see also *Hughes v. Oklahoma*, 441 U.S. at 337 (facial discrimination by itself may be a fatal defect). Such laws "will be struck down unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Wyoming v. Oklahoma*, 112 S. Ct. at 800 (citation omitted); see also *Healy*, 491 U.S. at 337 n.14; *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 790.

The Alabama tariff on out-of-state waste is precisely the type of law that historically has been subjected to a "virtually *per se*" rule of invalidity. By its terms, the \$72.00 per ton "Additional Fee" places a tariff on *all imported* waste shipped to Petitioner's Emelle, Alabama disposal facility from its out-of-state customers, but exempts *any* similar waste generated by Petitioner's *Alabama-based* customers. Thus, the legislation on its face, offers a preference to in-state economic interests at the expense of out-of-state interests. This is precisely what is meant by "economic protectionism" under this Court's cases.

In *Philadelphia v. New Jersey*, this Court dispelled any doubt whether there exists some implied exception to the principle barring state discrimination against out-of-state goods and services as it relates to the shipment of waste products. In that case, New Jersey sought to limit the flow of waste into the state, arguing that (1) the treatment and disposal of solid waste posed threats to the state's environment and the "limited natural resources" available for disposal in the state; and (2) the available landfill capacity within its borders was threatened by the treatment and disposal of waste originating both from within the state and from out-of-state sources. Notwithstanding the asserted health and safety purpose of New Jersey's law, this Court held that:

it does not matter whether the ultimate aim of [the law] is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands

from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected. But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State *unless there is some reason, apart from their origin, to treat them differently*.

437 U.S. at 626-27 (emphasis added).

By applying the \$72.00 per ton "additional fee" solely to "imported" waste, Alabama, like New Jersey, has "discriminat[ed] against articles of commerce coming from outside the State." *Id.* It has done so at the expense of the citizens of the many other states who seek to use, and do business with, the Emelle facility. That Alabama has employed its *taxing* power to accomplish this goal does not, in any way, diminish the nature of the discrimination or take this case outside the rule of *Philadelphia v. New Jersey*. Taxation—especially taxation at a rate expressly intended to discourage certain business activity—can be the vehicle for the most virulent forms of discrimination. See *New Energy*, 486 U.S. 269; *Welton v. Missouri*, 91 U.S. 275 (1875). It has long been established that "no State can, consistently with the Federal Constitution, impose upon the products of other States . . . more onerous public burdens or taxes than it imposes upon the like products of its own territory." *Guy v. City of Baltimore*, 100 U.S. 434, 439 (1879).

As noted above, Alabama may not discriminate against out-of-state goods "unless there is some reason, apart from their origin, to treat them differently." *Philadelphia v. New Jersey*, 437 U.S. at 627. Respondents have been unable to identify any basis, other than state of origin, for discriminating against waste coming from outside of Alabama. Specifically, no legal justification for Alabama's

discrimination can be based on the character of the hazardous wastes which cross its borders. As found by the trial court in this case, wastes shipped to the Emelle facility from outside Alabama—metals, solvents, oil, chemicals, and other waste—are no different from those generated *within* the state. Pet. App. 84a-86a.¹⁵ See also *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 788 (“hazardous wastes generated out-of-state pose no more threat to human health and the environment than hazardous waste generated” in state); *National Solid Wastes Mgt. Ass’n v. Alabama Dep’t of Env’tl. Mgt.*, 910 F.2d at 720. In the absence of such a distinction, any effort to discriminate against out-of-state waste *solely* because it is from out-of-state customers must fail. See *Philadelphia v. New Jersey*, 437 U.S. at 629 (“there is no basis to distinguish out-of-state waste from domestic waste”). Nonetheless, despite the virtual *per se* rule of invalidity established by this Court, the Alabama Supreme Court sustained the Additional Fee, brushing aside the statute’s facial discrimination against interstate commerce on the theory that Alabama had met its burden of justifying such patent discrimination.

The Alabama Supreme Court appears to have reasoned as follows: *First*, it attempted to remove the Additional Fee from the ambit of established Commerce Clause ju-

¹⁵ The Alabama appellate court did not take issue with the express finding by the trial court that there was no relevant distinction between waste generated within Alabama and waste generated in other states. As found by the trial court, “hazardous waste generated in Alabama is just as dangerous as such waste generated in other states.” Pet. App. 86a. See also *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 791. Thus, this Court’s observation in *Philadelphia v. New Jersey* seems particularly apt:

There is no basis to distinguish out-of-state waste from domestic waste. If one is inherently harmful, so is the other. Yet New Jersey has banned the former while leaving its landfill sites open to the latter.

437 U.S. at 629.

risprudence on the basis of the presumed health and safety objectives of the Alabama legislature. Pet. App. 41a-46a. *Second*, the Alabama Supreme Court transformed the constitutional prohibition on discrimination against interstate commerce into a prohibition on discrimination *motivated* by the State’s desire to provide *economic* benefits to local industry, finding the source of this principle in this Court’s admonition that the Commerce Clause applies most forcefully to “economic protectionism.” Pet. App. 38a-46a. Because the Additional Fee purportedly involved “health,” not “economics,” the Alabama Supreme Court reasoned that there was no constitutional violation and upheld the State’s \$72.00 tariff.

As shown below, Alabama’s argument fails for two related reasons. *First*, the distinction drawn by the Alabama appellate court ignores the clear holding of *Philadelphia v. New Jersey*, where this Court struck down the New Jersey law despite that state’s presumably legitimate health and safety justifications. However, whatever the “ultimate purpose [of the law], it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.” *Philadelphia v. New Jersey*, 437 U.S. at 626-27. The “virtually” *per se* rule of invalidity applies “not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade. . . .” *Maine v. Taylor*, 477 U.S. at 148 n.19; see also *New Energy*, 486 U.S. at 279 n.3 (public health purpose will not validate “patent discrimination against interstate commerce”).

Second, as *Philadelphia v. New Jersey* teaches, the form of “economic protectionism” prohibited by the Commerce Clause is not focused on the state legislature’s overriding motive for acting in a particular field. Whether the state chooses to act in the area of health and safety,

taxation, wages and hours, economic regulation, or banking, the focus is not on the general provenance of the law, but on the rationale *for the discrimination against commerce*. As this Court has reaffirmed, it is "the *discrimination* [that must be] demonstrably justified by a valid factor unrelated to economic protectionism." *New Energy*, 486 U.S. at 274 (emphasis added). In other words, there must be something different about the out-of-state goods—aside from their state of origin—that justifies the discrimination. Where there is no difference between the in-state and out-of-state goods, then there is, by definition, "economic protectionism" in the preference given "in-staters" over "out-of-staters." *Philadelphia v. New Jersey*, 437 U.S. at 626.

B. Alabama Cannot Justify Its Discrimination Against Out-Of-State Waste

When a state law discriminates against interstate commerce either on its face or in its practical effect, the "burden falls on [the state] 'to justify both [the law] in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives.'" *Wyoming v. Oklahoma*, 112 S. Ct. at 801 (quoting *Hughes v. Oklahoma*, 441 U.S. at 336 and *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977)). "At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.'" *Wyoming v. Oklahoma*, 112 S. Ct. at 801 (quoting *Hughes v. Oklahoma*, 441 U.S. at 337).

As shown below, Alabama cannot meet the heavy burden of demonstrating that its tariff serves a legitimate local purpose that cannot adequately be served through reasonable "nondiscriminatory alternatives."

1. The Additional Fee Does Not Serve A Legitimate Local Purpose

Although Alabama has sought to justify its Additional Fee as a health measure, the statute on its face does not take that form. The law is phrased not in terms of health or safety, but as a tax—indeed, a facially discriminatory tax—designed to serve as an "economic disincentive"¹⁶ to the movement of waste into the State. Significantly, importers of waste who are financially prepared to "pay the freight" are free to bring waste into the State irrespective of the asserted safety or health concerns. It therefore is clear that the law is less a health and safety measure than a naked effort to discourage the import of waste, out of a general sense that Alabama is bearing a disproportionate share of the national market for waste disposal. Of course, the purpose to discriminate cannot meet the required *legitimate* local purpose standard.

Suffice it to say that Alabama has not put forward any "local concern" that distinguishes Alabama's situation from that of any other state that might, just as legitimately, assert similarly broad health and safety rationales. See generally *Maine v. Taylor*, 477 U.S. 131 (upholding Maine's prohibition on importing live baitfish because of the potential for destruction of Maine's unique fisheries). In considering the legitimacy of any asserted local purpose, this Court should be skeptical of a state interest so broadly drawn that it might be advanced with equal force by *any* state seeking to justify discrimination against commerce. To allow such generic justifications to sustain facially discriminatory laws would be to allow precisely the type of economic warfare that the Commerce Clause was intended to prevent. The local purpose to be sustained must be sufficiently particularized so that it

¹⁶ See Brief of Respondent Sizemore and the Alabama Department of Revenue In Opposition to Petition for Certiorari at 13-14.

truly requires some unique and carefully considered response from the state enacting the discriminatory legislation. There is little room under the Constitution for each state, in addressing a common problem, to implement a policy of "every state for itself," if to do so means attempting to isolate the state from its sister states. This is because:

The entire Constitution "was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

Healy, 491 U.S. at 336 n.12 (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)). Here, Alabama has chosen to advance its local interests by insulating itself from a national problem, shared by *all* the states, in a distinctly discriminatory manner.

There is no need, however, to decide in this case whether the Additional Fee reflects a "legitimate" state interest. As shown below, it is clear that whether or not there is a legitimate purpose here, even a "presumably legitimate goal" cannot be advanced by "the illegitimate means of isolating the State from the national economy," *Wyoming v. Oklahoma*, 112 S. Ct. at 801 (quoting *Philadelphia v. New Jersey*, 437 U.S. at 627).

2. There Are Nondiscriminatory Alternatives Available To Those States That Believe They Are "Dumping Grounds" For Waste

Alabama cannot sustain its heavy burden of showing the *absence* of nondiscriminatory alternatives to accomplish its presumably legitimate goals. Any concern for the health and safety of its citizens arising from the disposal of hazardous waste can be and is currently met through health or safety standards *provided that such requirements apply evenhandedly and do not discriminate on the basis of state of origin*. See *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 792. Indeed, if the State primarily is interested in health and

welfare, any justification for applying strict standards to out-of-state wastes would apply *a fortiori* to identical wastes generated within the State.

In fact, the treatment and disposal regulations in place in Alabama and elsewhere, enacted pursuant to the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 *et seq.*, assure that all hazardous waste is disposed of in an environmentally sound and safe manner.¹⁷ In addition to promulgating neutral health and safety standards, Alabama might legitimately enact a rationally-based, *nondiscriminatory* fee to be imposed on *all* waste generators seeking to use Alabama facilities, in-state and out-of-state generators alike. If such a fee would fall equally on *Alabama* businesses as well as "out-of-staters," it would provide assurance that such a law was the product of a considered public policy of sufficient force and importance that the State was willing to apply it to its *own* businesses and citizens, not merely to outsiders. That same assurance is not provided when the state targets outsiders to bear the brunt of its health and safety concerns.

At the heart of this matter, however, is Alabama's central perception that certain other states are not bearing their "fair share" of hazardous waste treatment and disposal. Alabama traces this "fair share" problem to a failure on the part of other states to create, or allow the creation of, disposal and treatment facilities within their borders. Alabama's Additional Fee—like Alabama's earlier rejected efforts, and the efforts of other states similarly rejected by the federal courts—appears to be designed to rectify this perceived imbalance by placing pressures on other states to "create" treatment and dis-

¹⁷ See *Alabama v. United States EPA*, 871 F.2d at 1552 ("The regulations promulgated pursuant to [RCRA] ensure that facilities disposing of hazardous wastes do so in a manner consistent with eliminating health and environmental risks caused by the hazardous wastes") (citation omitted)."

posal facilities. Alabama thus seeks to achieve a "fair" allocation of waste disposal through self-help, through a financial disincentive which discourages the flow of waste into the State.

No principle of proportionality or "fair allocation" is built into the Commerce Clause. To the contrary, the Commerce Clause presumptively establishes allocation according to national market forces. It is to be expected that the unequal distribution of resources, innovations and other advantages among the states invariably will lead to imbalance and diversity, with some states excelling in certain industries and lagging behind in others.

Alabama remains free, within certain constitutional limits, indirectly to influence the allocation of hazardous wastes or other goods among and between the states through a host of nondiscriminatory means. A state "clearly may undertake to enhance the advantages of industry, economy, and resources that make it a desirable place." *Zobel v. Williams*, 457 U.S. 55, 67 (1982) (Brennan, J. concurring). A state may regulate its economy and ensure the health of its citizens through rules of general application. But a state may not seek to legislate against some other state or states, or to regulate *directly* the import or export of interstate commerce. That is solely the responsibility of Congress under the Commerce Clause.

This case well illustrates the respective roles of the states and the federal government regarding the flow of commerce and the "fair allocation" of the burdens of membership in the national union—at least as respects hazardous waste. Fulfilling its constitutional responsibilities, Congress has established federal regulatory authorities and made various procedures available to the states to rectify precisely the kinds of imbalances about

which Alabama complains. To be sure, the federal program¹⁸ prescribes that the preferred approach to the national problem of hazardous waste management remains in *open* state boundaries, *consistent* state health and safety regulations, a *nationwide* market, and *incentives* to encourage states to permit the construction of much-needed, technologically advanced facilities across the country. Nonetheless, any state that believes it is unfairly the victim of another state's failure to meet its environmental obligations may seek several forms of relief.

First, Alabama, South Carolina or any other state that believes it bears an "unfair burden" may petition the Federal Government to have a "recalcitrant" state's RCRA authority withdrawn.¹⁹ A state to which EPA has delegated RCRA authority—to oversee the permitting and

¹⁸ The federal program includes the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6901-6991, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, and the Superfund Amendment and Reauthorization Act ("CERCLA" and "SARA"), (the "Superfund" statutes), 42 U.S.C. §§ 9601-9675, and the Hazardous Materials Transportation Uniform Safety Act ("HMTUSA"), 49 U.S.C. App. §§ 1801-1819. RCRA addresses the *management* aspects of treating and disposing of solid wastes; CERCLA and SARA the *cleanup* of abandoned or mismanaged substances and wastes; and HMTUSA the safe *transportation* of hazardous wastes.

¹⁹ See 42 U.S.C. § 6926(e) ("the Administrator shall withdraw authorization of such program and establish a Federal program"). In recognition of the need for a hazardous waste management program that is "national in scope and concern," Congress enacted RCRA in 1976, 42 U.S.C. § 6901, a law which "attempts to address hazardous waste before it becomes a problem." *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 783. RCRA provides a mechanism for directly regulating the health and safety aspects of hazardous waste treatment and disposal through the creation of mandatory standards. While EPA retains overall authority to administer this national program, participating states, after submission of a program acceptable to EPA, may implement

regulation of hazardous waste facilities, generators and transporters—may have that authority withdrawn by EPA if its program is not “consistent with” the federal program. 42 U.S.C. § 6926(b). Significantly, EPA has made clear that a state RCRA program is “inconsistent” if it “unreasonably restricts, impedes, or operates as a ban on the free movement across the state border of hazardous waste.” 40 C.F.R. § 271.4(a) (1991). If, as Alabama and South Carolina contend, other states have failed to carry their “fair share” of the hazardous waste problem—refusing to allow construction of new or expanded facilities because of the NIMBY syndrome—then EPA may withdraw the RCRA authority of these states. See generally *Hazardous Waste Treatment Council v. Reilly, Administrator of EPA*, 938 F.2d 1390 (D.C. Cir. 1991).

Second, Alabama separately can petition EPA to deny Superfund money²⁰ to a state that refuses to allow new

their own waste management programs “in lieu of the federal program . . . in such State” so long as it is “equivalent to” and “consistent with” EPA regulations. 42 U.S.C. § 6926(b). An approved state RCRA program may contain health and safety criteria “more stringent” than the federal technical requirements. 42 U.S.C. § 6929. Congress also enacted the Hazardous and Solid Waste Amendments of 1984 (“HSWA”), Pub. L. No. 98-616, establishing national land disposal restrictions which require that hazardous wastes be treated by using the “best demonstrated available technology” before the waste can be land-disposed.

Significantly, in applying for and receiving authority for its *intra-state* program, Alabama necessarily agreed to meet EPA “consistency” requirements, including the requirement that it not use its authority in a way that “unreasonably restricts, impedes or operates as a ban on the interstate movement of hazardous waste.” 40 C.F.R. § 271.4(a).

²⁰ In 1980, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), the initial “Superfund” statute. 42 U.S.C. §§ 9601-9675. CERCLA created a fund of federal monies available to states to be used for “response”

facilities to be built in that state, pursuant to CERCLA § 104(c)(9),²¹ a step which South Carolina recently took

actions—the cleanup of hazardous substances which had been released into the environment in a manner that is harmful to the public health and welfare of the environment. See *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 783.

²¹ Section 104(c)(9) of CERCLA (42 U.S.C. § 9604(c)(9)) requires each state that seeks Superfund assistance to provide assurances that it has moved to create disposal and treatment capacity within the state equivalent to the amount of waste it generates. As amended, Section 104(c)(9) of SARA “places the burden of making capacity assurances for future hazardous waste management on the *generating state* and imposes a sanction on that state for failure to satisfy its obligation.” *National Solid Wastes Mgt. Ass’n v. Alabama Dep’t of Env’tl. Mgt.*, 910 F.2d at 721. See generally *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 783-84; see also 132 Cong. Rec. S14,924-25 (daily ed. Oct. 3, 1986) (remarks of Sen. Chafee).

Section 104(c)(9) reflects Congress’ desire to ensure that the *national* need for additional and expanded waste facilities is met by assuring that *each* state assumes its fair share of the responsibility for the maintenance and creation of treatment and disposal capacity. Therefore, as a minimum requirement, Section 104(c)(9) conditions a state’s receipt of Superfund money upon the state providing satisfactory assurance that it will have “capacity” to treat, store and dispose of hazardous waste that is at least equal to the amount of waste that will be generated *within* that state over the next twenty years. 42 U.S.C. § 9604(c)(9)(B); *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 783-85, 794-95.

Thus, Section 104(c)(9) operates as a “counting” device to help solve the NIMBY problems “that arose because of political pressure and public opposition.” *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 784. Using its own projected generation of waste as the baseline, each state is assigned proportional responsibility to create enough capacity to meet its share of the *overall national need*. Under this approach, if *each* state assures EPA that it has capacity equal to the amount of waste *projected* to be generated within its borders, there will be sufficient *national* capacity to treat and dispose of all hazardous waste. This does not mean that each state must treat and dispose of its own waste; the market for the use of that capacity is intended to operate freely across state lines. But CERCLA and SARA provide encouragement to license and develop capacity within each state in rough proportion to the amount of waste each state generates.

against North Carolina, a state that has refused to permit the construction of any new facilities. See *South Carolina v. Reilly, Administrator of EPA*, C.A. No. 91-3090 (D.D.C. filed Nov. 25, 1991); see generally *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 784-85. Under CERCLA—or, more specifically, the 1986 amendments to CERCLA known as SARA—each state must provide a “Capacity Assurance Plan” to EPA projecting the creation of treatment and disposal capacity in proportion to the amount of waste that is generated within the state. The failure to provide such assurances, or subsequently to make good on them, will trigger a cutoff of Superfund monies.

Third, any state may continue to seek a cooperative solution to the problems of “inequitable distribution” through the voluntary CERCLA/SARA Regional Agreement process.²² While such agreements are not enforceable—indeed recalcitrant states can be expelled from a regional agreement as quickly as they are brought in—these regional agreements reflect the cooperative approach fashioned by Congress. See *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 784-85, 786 n.8.

Finally, Alabama can petition Congress, through its delegation, to seek changes to the federal program. Alabama does not presently favor that approach, but only because its own parochial efforts to restrain the import of wastes will not be well-received in the national legislative branch.²³ As shown above, Congress has done much

²² Under CERCLA § 104(c)(9)(B), a state may enter into cooperative agreements with other states to satisfy its obligations to provide treatment and disposal capacity equal to its generation of waste. See generally *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 784-85.

²³ Specifically, as Alabama Governor Hunt has stated in this case: The proposed remedy through Congressional action is illusory. Congress has done nothing. Should the decision of the Alabama Supreme Court be set aside, in all probability Congress will continue to do nothing. The votes are simply not there, due to

to address the national problem of hazardous waste. While establishing mechanisms and incentives to correct “imbalances” and to assure that each state fulfills its responsibilities it also has provided for the national market to function—without state interference—until that balance is achieved. As the Fourth Circuit has held:

Unless and until Congress alters the law, the apparent congressional intent of RCRA and SARA would seem to remain—better that hazardous waste be treated and disposed of somewhere, even if spread disproportionately among the states, than that future Superfund sites arise.

945 F.2d at 792.

In sum, any health and safety concerns asserted by Alabama could be addressed by *bona fide* nondiscriminatory regulations establishing health and safety standards. As to Alabama’s assertion that it is bearing a disproportionate share of the Nation’s hazardous waste burden, this State simply has chosen an improper means—discriminating against interstate commerce—for equalizing that burden by entering into a field reserved exclusively to Congress and the federal regulatory authorities designated by Congress.

II. THE CIRCUMSTANCES WARRANT A CLEAR RULE THAT WILL PLACE EACH OF THE STATES ON EQUAL FOOTING IN UNDERSTANDING THEIR CONSTITUTIONAL RESPONSIBILITIES UNDER THE COMMERCE CLAUSE

In a “national economy filled with benefits and burdens,” *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 792, Alabama seeks to continue to

the “NIMBY” syndrome existing in practically every one of the great majority of states which do not have a permitted hazardous waste commercial landfill.

See Supplemental Brief of Respondent Hunt in Opposition to Petition for Certiorari at 2 (footnote omitted).

avail itself of the benefits, but divorce itself from the burdens. Specifically, while Alabama enjoys the benefits of open borders between its sister states by shipping and receiving the products of agriculture and industry that create the hazardous waste, it wants to "stop the flow" of waste generated by industry, agriculture and Superfund cleanup sites in other states which are sent to Emelle, Alabama for treatment and disposal.

Although Alabama presumably is not prepared to renounce the benefits of free interstate trade generally, it has not hesitated to exclude the transportation of this article of commerce into the state for safe treatment or disposal. This short-sighted outlook is commonly attributed to what has been called the "NIMBY" syndrome—"not in my backyard." Although the need for safe and efficient hazardous waste treatment and disposal is universally acknowledged, the plain fact of the matter is that most citizens would prefer that the facilities providing those services not be located in their state.

In the state and local political arena, the pressure to enact legislation keeping hazardous waste from some *other* state out of one's *own* state is virtually irresistible. See, e.g., *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781. Declarations by state officials that they will not allow their home state to become a "dumping ground" for the hazardous waste of other states may indeed arise from a genuine concern; often, however, they reflect as well the most politically expedient course.

The local pressure on state legislators to enact laws that limit the flow of waste into their state is intensified when *other* states have enacted such laws.²⁴ Because citi-

²⁴ The \$72.00 Additional Fee allows Alabama to "preserve" space at "its" Emelle facility—a privately-owned facility—for the future benefit of *its* own residents. But by preserving Petitioner's facility for Alabama residents, Alabama thus shifts the burden of treating and disposing "imported" hazardous waste to *other* states. These

zens of *other* states, whose goods are barred from the State, do not vote for the state representatives setting forth the discriminatory restriction, it is relatively easy for a local legislative body to pass laws burdening such "out-of-staters."²⁵ In turn, the only recourse that those "out-of-staters" have (short of the courts) is to their *own* state legislatures to adopt similar exclusionary laws. Thus, there is direct pressure to retaliate against states that will not accept the import of waste.

Given the nature of the issue and its political appeal, it is not surprising that some states have been both persistent and innovative in seeking to implement such bans against the import of waste.²⁶ So long as any ambiguity in the constitutional limits remains, some states will continue to seek to take advantage of that ambiguity—as Alabama has done here—by directly and unfairly burdening the majority of states that continue to play by the constitutional rules.

Moreover, as the Fourth Circuit recently observed, the efforts of various states to limit the import of out-of-state waste—thereby reducing the available capacity to

other states, in turn, are thereby pressured to enact their own laws, either as retaliation or simply to "protect" themselves (and their citizens and industry) from out-of-state hazardous waste. The immediate result is the balkanization of the national economic union, the very circumstance which compelled the framers to put the Commerce Clause in the Constitution after experiencing the chaos of the Articles of Confederation. See *Healy*, 491 U.S. at 335-37.

²⁵ Indeed, such laws frequently are designed expressly to coerce other states into changing their policies. This approach was evident in Alabama's earlier blacklist of certain states (which Alabama felt were not living up to their responsibilities), see *National Solid Wastes Mgt. Ass'n v. Alabama Dep't of Env'tl. Mgt.*, 910 F.2d at 718, and in South Carolina's similar efforts to restrict the import of waste from North Carolina and other states. See *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 791-93.

²⁶ Thus, Alabama resorted to a tax only after its other efforts to limit the flow of commerce were rejected by the federal courts.

safely dispose of the waste—could have the immediate effect of causing some industries and citizens to return to the dark days of dumping waste illegally. *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 792. As such, more “Superfund” dumping sites may arise across the Nation if Alabama, and states following Alabama’s lead, are allowed to remove regulated disposal capacity from the national marketplace, frustrating the national health and safety goals of the federal regulatory scheme. *Id.* Indeed, the Fourth Circuit admonished that “the effect of every state designing particular limits and bars for out-of-state waste could be catastrophic.” *Id.*

Thus, this case not only calls for reversal, but for a clear reaffirmation of the principles requiring reversal so as to put to rest the temptation on the part of many states to succumb to the NIMBY syndrome and enact similar discriminatory laws.

CONCLUSION

The decision of the Alabama Supreme Court should be reversed.

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March 12, 1992

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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1991

CHEMICAL WASTE MANAGEMENT, INC.,

Petitioner,

against

**GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA;
ALABAMA DEPARTMENT OF REVENUE; and JAMES M.
SIZEMORE, JR., COMMISSIONER OF THE ALABAMA
DEPARTMENT OF REVENUE,**

Respondents.

**Brief of the State of New York as *Amicus Curiae* in
Support of Respondents**

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Question Addressed

In enacting the Superfund Amendments and Reauthorization Act, did Congress authorize states to manage the interstate flow of hazardous wastes, as Alabama has done by enacting the Additional Fee provision, in order to meet the federally-mandated requirement that states demonstrate long term capacity for disposal of such wastes?

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No. 91-471

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991.

CHEMICAL WASTE MANAGEMENT, INC.,

Petitioner,

against

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA; ALABAMA DEPARTMENT OF REVENUE; AND JAMES M. SIZEMORE, JR., COMMISSIONER OF THE ALABAMA DEPARTMENT OF REVENUE,

Respondents.

Brief of the State of New York as *Amicus Curiae* in Support of Respondents

Interest of *Amicus Curiae*

The State of New York submits this brief as *amicus curiae*, pursuant to Rules 37.1 and 37.5 of the Supreme Court rules, in support of the respondents, who urge this Court to affirm the decision of the Supreme Court of Alabama ("court below"), reported at 584 So. 2d 1367 (1991). The court below sustained an Alabama statute which, *inter alia*, imposes an additional

disposal tax ("Additional Fee") on hazardous wastes generated outside Alabama and disposed of at Alabama facilities.¹

The State of New York has a substantial interest in the outcome of this case. Like Alabama, New York has a large commercial hazardous waste disposal facility within its borders. The New York facility, owned and operated by CWM Chemical Services, Inc. ("CWM"), is the only commercial hazardous waste landfill in the Northeastern United States. In the fall of 1989, it became apparent to New York officials that other Northeastern states intended to meet their capacity assurance obligations under § 104(c)(9) of the Superfund Amendments and Reauthorization Act ("SARA"), 42 USC § 9604(c)(9), simply by continuing to utilize New York's hazardous waste disposal capacity, in lieu of expanding their own capacity as envisioned by SARA.

In response, New York Commissioner of Environmental Conservation Thomas C. Jorling announced his intention to manage the flow of hazardous wastes from other states through cooperative agreements with individual states. Each agreement will, *inter alia*, require the exporting state to impose waste reduction requirements on its generators and transporters equivalent to requirements contained in New York law.²

¹The challenged statutory provision is reprinted at Pet. App. 102a-114a.

²New York has one of the most aggressive hazardous waste reduction laws in the nation. See, Environmental Conservation Law §§§ 27-0907, 0908 and 0913. These provisions require hazardous waste generators to audit their operations and to implement waste reduction measures which are technically feasible and economically practicable. Stiff penalties are imposed for noncompliance. DEC may reject plans which do not achieve reasonable progress in waste reduction. Ultimately a recalcitrant generator could be forced to curtail operations because it could not issue the certifications or manifests necessary to transport hazardous waste for disposal (Footnote continued on next page.)

New York subsequently attempted to impose these restrictions by issuing a proposed permit modification to the CWM facility. CWM then filed suit in the Western District of New York in December, 1990, asserting, *inter alia*, that New York's proposed modifications violate the Commerce Clause of the United States Constitution. *National Solid Wastes Management Association and CWM Chemical Services, Inc. v. Jorling*, 90-CV-1288A. The Commissioner has defended on the ground that SARA's capacity assurance provisions authorize New York's intention to control the flow of hazardous waste into the State through cooperative agreements with exporting states.

The State of New York respectfully urges this Court to sustain the lower court's decision, and decide that in enacting SARA, Congress authorized states to manage the interstate flow of hazardous waste in order to meet their federally-mandated capacity assurance obligations.

Summary of Argument

The Superfund Amendments and Reauthorization Act of 1986 ("SARA") expressed Congress' displeasure with the failure of many states to site new hazardous waste facilities, and addressed the "Not-in-My-Backyard" problem by requiring *all* states to demonstrate that they will have adequate in-state and/or out-of-state resources for disposing of all wastes

(Footnote continued.)

and on annual reports required by law. This program is consistent with the federal policy codified at 42 USC § 6925(h), and reflects New York's preferred hazardous waste management hierarchy, codified at Environmental Conservation Law §27-0105, which calls for: (1) reduction or elimination of hazardous wastes that continue to be generated; (2) reuse and recycling of hazardous wastes that continue to be generated; (3) use of detoxification, treatment or destruction technology; and (4) phasing out land burial of hazardous wastes except for treated residuals posing no significant threat to public health or the environment.

generated within the state for the next two decades. In enacting SARA, Congress authorized states to manage out-of-state access to waste disposal facilities in order to meet these mandated capacity assurance requirements. Finally, the Additional Fee provision, enacted by Alabama to ensure adequate landfill space for Alabama's waste generators, is consistent with the Congressional authorization contained in SARA.

Argument

Congress enacted the capacity assurance provisions in SARA to force states to site new, state-of-the-art hazardous waste treatment facilities designed to safely handle wastes that continue to be generated by industrial activities and Superfund remedial efforts. In sustaining Alabama's Additional Fee provision, the court below enabled Alabama to protect its valuable disposal capacity from states that are content to continue to export unreasonable quantities of hazardous waste without regard to their own siting obligations. Affirmance by this court is necessary to clarify the ability of states to manage out-of-state hazardous waste imports in order to meet their federally-mandated capacity assurance obligations.³

³Alabama did not argue in the lower courts that SARA authorizes the Additional Fee provision. Instead, it asserted that the provision furthers legitimate local purposes—protection of public health and the state's natural resources—that cannot be adequately met by reasonable non-discriminatory alternatives. 584 So. 2d at 1388-1390. In light of this Court's time-honored practice of not reaching constitutional issues unnecessarily, *see, Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 157 (1984) ("It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them"), the State of New York respectfully suggests that the Court can sustain the lower court on the nonconstitutional ground that the Additional Fee provision is authorized by Congress' enactment of SARA.

A. In Enacting the Capacity Assurance Provisions of SARA, Congress Authorized States to Manage the Interstate Flow of Hazardous Waste to meet their Assurance Obligations.

In 1980 Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC § 9601 *et seq.* ("CERCLA") in order to ensure cleanup of inactive hazardous waste sites. CERCLA established liability standards for persons responsible for cleanups and created a "Superfund" for use when responsible parties do not carry out cleanups. *See*, 42 USC § 9601, *et seq.*

Congress reauthorized CERCLA in 1986, enacting the Superfund Amendments and Reauthorization Act ("SARA"), P.L. No. 99-499. Because Congress concluded that few states had developed programs to assure safe disposal capacity for hazardous waste which continued to be generated by industry, it enacted a capacity assurance provision ("CAP"), codified at § 104(c)(9) of SARA, 42 USC § 9604(c)(9). This provision directed each state to demonstrate to the United States Environmental Protection Agency ("EPA") that the state will have adequate capacity available to dispose of or otherwise manage the hazardous wastes generated within the state for the next twenty years.

The legislative history of SARA demonstrates that the intent behind the capacity assurance obligations was to ensure adequate siting of new, state-of-the-art hazardous waste management facilities across the country. *See*, S. Rep. No. 11, 99th Cong, 1st Sess. 22 (1985):

"Pressures from local citizens place the political system in an extremely vulnerable position. . . . The broader social need for safe hazardous waste management facilities often has not been strongly represented in the . . . process [of creating new facilities]. A com-

mon result has been . . . no significant increase in hazardous waste capacity over the past several years."

Similarly, Senator Chafee, the sponsor of the CAP provision, stated on October 3, 1986 (the date upon which the legislation passed the Senate) that:

"The objective of the siting amendment is to *force* states to provide safe and adequate facilities for toxic and hazardous waste."

132 Cong. Rec. S. 14924 (emphasis supplied).

Congress recognized that not every state would be able to create new disposal facilities or otherwise manage its waste within its own borders for the next twenty years. Thus, states have the option of using capacity outside their borders pursuant to agreements with other states. If EPA determines that state capacity certifications are not adequate, the state is *prohibited* from receiving Superfund money for hazardous waste site cleanups taken within the state. 42 USC §9604(c)(9).

The CAP amendments thus contain two important elements: first, they force states to plan for and develop safe disposal or treatment capacity for all hazardous waste generated for a twenty year period; second, to the extent a state uses disposal facilities outside the state, it can only do so pursuant to interstate or regional agreements with the states in which such facilities are located. As such, Congress has authorized states to manage out-of-state access to waste disposal facilities by requiring exporting states to enter into cooperative agreements acceptable to the host state.

While Congressional consent for states to impede commerce must be clear, there is no "talismanic significance" to any particular method of demonstrating Congressional author-

ization. *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 90 (1984). This Court has identified three ways in which such consent may be established: (1) from Congressional intent, *see, Wunnicke, supra* at 92-93; (2) through an evaluation of federal policy, *Wunnicke* at 88; and (3) based upon a course of conduct, *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1, 10 (1986). Significantly, once Congress has authorized state regulation of interstate Commerce, *any* action taken by a State within the scope of the congressional authorization is rendered invulnerable to a Commerce Clause challenge. *Western & Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. 648 (1981).

As demonstrated above, Congress determined that it was in the national interest to ensure development by the states of safe, long-term disposal capacity for hazardous waste which continued to be generated nationwide. In enacting the CAP provisions, Congress intended to *force* states to develop such capacity, and threatened states with the loss of Superfund cleanup monies in the event of failure. The only way for "host" states to avoid this drastic penalty is to control the flow of waste to commercial disposal facilities located within their borders—the Emelle landfill in Alabama's case. Any other construction of SARA would prevent a state from managing and predicting capacity, and would ultimately subject it to the loss of Superfund dollars.⁴

⁴New York recently sued the Environmental Protection Agency, claiming that the federal agency has failed to carry out its mandatory duty under 42 USC §9604(c)(9) to appropriately sanctioned states that have refused to develop new hazardous waste disposal capacity. *State of New York, et al. v. Reilly*, 91-CV-1418 (N.D.N.Y.). New York alleges that (Footnote continued on next page.)

B. The Additional Fee Provision is Consistent With the Congressional Authorization to the States Contained in SARA.

Finally, the Additional Fee provision, enacted by Alabama to, *inter alia*, satisfy its federally-mandated CAP obligations, is consistent with the authorization conferred by Congress in SARA. The provision discourages disposal at Alabama's Emelle disposal facility and forces states previously dependent upon Emelle to develop facilities within their borders or enter into cooperative agreements as envisioned by 42 USC §9604(c)(9). By being forced to site facilities, as contemplated by Congress, a state then has capacity for some types of wastes which it can then use to "bargain" with other states which have other types of facilities (e.g., landfills, incinerators, recycling plants) so as to assure the execution of interstate agreements.

(Footnote continued.)

EPA's "rubberstamp" approvals of clearly deficient CAPs submitted by many states is frustrating Congress' intent that all states ensure adequate capacity for proper hazardous waste management, and is imposing an unfair and unequitable burden on states such as New York that have sought to minimize the amount of their hazardous waste and provide adequate disposal capacity.

CONCLUSION

For the foregoing reasons, the State of New York respectfully urges this Court to affirm the determination of the Supreme Court of Alabama.

Dated: Albany, New York
April 7, 1992

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IN THE
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October Term, 1991

CHEMICAL WASTE MANAGEMENT, INC.,
PETITIONER

v.

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RESPONDENTS

On Writ of Certiorari to the
Supreme Court of Alabama

AMICUS CURIAE BRIEF IN SUPPORT OF GUY HUNT,
GOVERNOR OF THE STATE OF ALABAMA;
ALABAMA DEPARTMENT OF REVENUE; AND
JAMES M. SIZEMORE, JR., COMMISSIONER OF THE
ALABAMA DEPARTMENT OF REVENUE, RESPONDENTS,
SUBMITTED BY THE STATES OF OHIO AND KENTUCKY
ON BEHALF OF THE STATES OF INDIANA, UTAH,
NEW MEXICO, SOUTH DAKOTA, KANSAS, LOUISIANA
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QUESTION PRESENTED

Whether an Alabama statute that imposes a reasonable hazardous waste disposal tipping fee on out-of-state waste and an annual volume limitation, both of which are designed to protect and compensate Alabama for the health and safety and costly environmental risks it assumed when it sited a hazardous waste disposal facility that accepts nearly 90% of its waste from out-of-state generators, violates the Commerce Clause.

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STATEMENT OF INTEREST

Most of the *Amici* states have been authorized by the U.S. Environmental Protection Agency (U.S.EPA) to operate a hazardous waste management program "in lieu of" federal law pursuant to Section 3006(b) of the Resource Conservation and Recovery Act of 1976, as amended (RCRA), 42 U.S.C. Section 6926(b). Nonetheless, improvidently broad judicial applications of *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), have frustrated the states' abilities to meet the policies and mandates of federal law, or implement their own hazardous waste management policies and strategies. In the discrete area of solid waste, states have been continually frustrated in their attempts to enact reasonable measures to control interstate waste, despite the health and safety reasons advanced, reasons which exist in immeasurably greater magnitude in the hazardous waste field. This case is the opportunity by which the Court can clarify or limit the principles announced in *City of Philadelphia*, and thereby suggest a course of action for those states which have been thwarted in their efforts at reasonable interstate hazardous waste management. With benefit of a decision defining state authorities in the area of interstate hazardous waste management, it is hoped that responsible states like the *Amici* states can be spared the constant frustrations that they have been forced to suffer due to misapplication of *City of Philadelphia v. New Jersey*, both to factually distinct solid waste cases, and altogether to the unique area of hazardous waste management. Further, although the respective laws of Alabama and the *Amici* states differ substantively and their factual bases are somewhat distinct, an explanation from the Court of the proper authority and standards which apply to the states in interstate hazardous waste management will be of immeasurable value in guiding the *Amici* states in their implementation of the federal structure and requirements of RCRA as authorized to the states under approved programs.

SUMMARY OF ARGUMENT

Two of the great and pressing pollution problems facing the nation today are the need for the siting of hazardous waste disposal facilities and the need for effective hazardous waste management. Unfortunately, courts in this country have broadly and anachronistically expanded the holding in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), in a manner which thwarts, rather than promotes, these goals. Specifically, the majority in *City of Philadelphia*, which had before it an exclusively solid waste case, failed to address, much less appreciate, the inherent and undeniable dangers in the transportation and disposal of hazardous waste. Further, our vastly increased knowledge about the dangers of hazardous waste, and the comprehensive regulatory schemes that have developed on the state and federal levels on the basis of that knowledge since that time, warrant special consideration of hazardous waste outside the traditional parameters of the Commerce Clause of the federal Constitution expressed in *City of Philadelphia*.

As set forth in the following argument, there are many reasons why the principles announced in *City of Philadelphia* should not apply to hazardous waste cases. The *Amici* particularly emphasize the similarities between hazardous waste and those items permissibly banned by states in the quarantine cases long ago decided by the Court. Precedent established in those cases survives in the more recent decision of the Court in *Maine v. Taylor*, 477 U.S. 131 (1986), which is the more appropriate rule to be applied to the interstate transportation of dangerous hazardous waste.

Further, the *Amici* states refer the Court's attention to the number of significant pieces of federal environmental legislation passed since the mid-1970's. Congressional recognition of hazardous waste as a significant national problem is evident in this great emphasis on regulating waste and, more recently, hazardous waste, since 1976. These developments lead to the inescapable conclusion that *City of Philadelphia*, insofar as it has been broadly misapplied by the lower courts, should instead be limited to its historical

context, and recognized as a legal relic decided by this Court at a time at which the financial and environmental burdens which have ultimately proved to result from the unrestricted disposal of toxic and hazardous waste could not have been fully realized. Along this line, the *Amici* submit that the pervasive and comprehensive regulation of hazardous waste, which is necessitated by its known as well as its unknown dangers, indicates that the present day waste management process should invoke permissible control and regulation over undesirable waste streams under the states' sovereign powers, rather than the restraints applied to traditional items of commerce in "goods".

The need for state control over the interstate transportation of hazardous waste also stems from the lack of control over the out-of-state generator of hazardous waste. In this respect, out-of-state waste is inherently different from in-state hazardous waste, such that the value of *City of Philadelphia*, which prohibited discrimination based solely on the origin of the solid waste, is again called into question. The duty of states under the Resource Conservation and Recovery Act regulations adopted in 1980 to provide for the independent inspection and verification of hazardous waste is exceedingly difficult, if not impossible, where out-of-state generators are involved. The inability to regulate the manner in which such wastes are generated may result in the unlawful disposal of certain hazardous wastes in facilities not equipped to landfill such waste, may unduly prejudice the importing state's waste management law and policies and may impose health and environmental burdens on the disposal state.

The Court has never squarely addressed the issues attendant to the interstate transportation and disposal of hazardous waste. *City of Philadelphia* dealt exclusively with the interstate transportation of municipal solid waste. As a consequence of the failure to precisely address a state's power to enact reasonable restrictions on the interstate movement of hazardous waste in order to protect the public health and the integrity of a state's natural resources, the Court has never decided whether hazardous waste is an

article of commerce entitled to full constitutional protection. Absent this specific guidance, the proper analysis for this discrete regulatory field of publicly-perceived "bads" is that contained in Chief Justice Rehnquist's dissent in *City of Philadelphia*. In that dissent, Chief Justice Rehnquist would have upheld New Jersey's ban under the authority of the quarantine cases. *City of Philadelphia*, at 632 (Rehnquist, J., dissenting). *Maine v. Taylor*, 477 U.S. 131 (1986), a case engendered by that dissent, is the proper basis for decision in this case. The peculiar hazards associated with the hazardous waste industry must be recognized as warranting the same considerations as the quarantined items permissibly banned in *Bowman v. Chicago & Northwestern Railroad Company*, 125 U.S. 465 (1888), and the hazardous waste situation should be clearly set apart from the Court's consideration of solid waste issues.

In the alternative, the Court should take advantage of the opportunity presented in this case to reexamine *City of Philadelphia*. Many of the assumptions underlying the *City of Philadelphia* decision are of questionable application to dangerous hazardous waste. One notable distinction which the *City of Philadelphia* majority altogether failed to recognize is that the purpose of waste stream regulation is regulation and control, not consumption. The hazardous waste stream is not a commodity for purchase which states are inclined to hoard, but a liability which should be managed by those who generated it. States which import hazardous waste are currently powerless to independently verify the contents of the waste at the point of generation, and therefore should have power to control the influx of waste which may violate their waste management policies, e.g., toxics use reduction or overall waste minimization.

Finally, when a sovereign state reasonably limits or restricts the use of its disposal facilities, this does not prevent other states from similarly addressing their own needs, nor infringe upon any of the national values traditionally protected by the dormant Commerce Clause. Consequently, although *Maine v. Taylor* may indeed serve as the basis for this Court's affirmance of the Alabama Supreme Court's determination

that Alabama may protect and compensate its citizens from the dangers to health and the environment associated with the huge volumes of out-of-state waste imported to the Emelle facility for permanent landfilling, this Court should additionally use the opportunity presented in this case to overrule *City of Philadelphia*.

ARGUMENT

I. Inappropriately Broad Judicial Application Of *City of Philadelphia* To The Interstate Transportation And Disposal Of Hazardous Waste Has Fostered Public Opposition To The Siting Of Much-Needed Hazardous Waste Disposal Facilities And Conflicts With Congressional Policy.

The real significance of the threat posed to our industrialized society by hazardous waste has only dawned on the public over the past ten to fifteen years. The Emelle facility in Alabama was one of the first permitted disposal facilities in the country. It was permitted in 1978, the same year *City of Philadelphia* was decided by this Court, and nearly three years before the all-encompassing federal RCRA regulations forever changed state duties and obligations with respect to hazardous waste. Because this overbroad and outdated application of *City of Philadelphia* potentially obligates every state to accept hazardous waste without any qualifications or restrictions imposed on sources, not one new operational hazardous waste landfill has been developed in the United States in the last 11 years. As a result, it is undisputed that Alabama, Ohio and other net importing states are handling a grossly disproportionate share of the nation's hazardous waste disposal and treatment burden. Without benefit of enlightened decisions such as that by the Alabama Supreme Court below, states which accept their responsibility to treat and dispose of, at a minimum, certain types of their own hazardous waste, are absolutely powerless to ensure that such created capacity will exist for such disposal, and are deprived of control over the influx of this dangerous and environmentally costly waste.

As a result of political pressures arising out of the Not In My Back Yard (NIMBY) syndrome across the nation, and overbroad applications of the Commerce Clause principles handed down in *City of Philadelphia* as herein advocated by Chemical Waste Management, states which otherwise might site facilities will persist in their refusal to authorize hazardous waste disposal sites. The main beneficiaries of this improper application are landfill operators, like Petitioner, which seek to maximize their profits by filling state authorized capacity at the fastest rate possible, without regard to whether such unrestricted disposal furthers responsible state, regional or national hazardous waste management policy as clearly expressed in the debates surrounding the Superfund Amendments and Reauthorization Act of 1986, Pl. 99-499 (discussed, *infra*.) Consequently, states, rather than responsibly siting their own facilities, continue to irresponsibly dump huge amounts of hazardous waste on other states like Alabama.

The lynchpin of Chemical Waste Management's arguments to this Court, *City of Philadelphia*, is clearly distinguishable from the present hazardous waste case for a number of reasons. First, unlike the simple solid waste or garbage dealt with in *City of Philadelphia*, the instant case concerns hazardous waste, which is inherently dangerous in all respects, including transportation as well as disposal. Second, unlike the State of New Jersey in *City of Philadelphia*, Alabama is not attempting to hoard its remaining hazardous waste landfill space by isolating itself from a common problem. Alabama is not erecting a rigid ban against the movement of all out-of-state hazardous waste, but is only seeking to limit the volumes of hazardous waste coming to Emelle from out-of-state generators and to ensure that these out-of-state generators bear a fair share of the financial burdens and costly environmental risks potentially posed by the transportation of hazardous waste, and by its ultimate disposal there. Finally, unlike New Jersey in *City of Philadelphia*, Alabama's actions are a reasonable and legitimate exercise of its police powers aimed at protecting its natural resources and the health of its citizens through a more equitable cost-sharing among those states which

have chosen to use Emelle as an alternative to siting politically undesirable hazardous waste facilities within their own borders. Importantly, *City of Philadelphia* does not hold that a state may not limit importation of wastes to protect health and the environment, it holds only that a state may not do so for simple economic protectionism. Thus, the clearly-expressed health and safety purposes underlying the Alabama law remove it from the coverage of *City of Philadelphia*.

As mentioned previously, *City of Philadelphia* quite clearly neither involved nor addressed hazardous waste. By implication, however, the Court in *City of Philadelphia* left the door open to discrimination on the basis of the "harmful effects" of the subject item of commerce, refusing to apply the quarantine line of cases primarily because there was no claim by New Jersey "that the very movement of waste into or through New Jersey endangers health." *City of Philadelphia*, at 628-629. Here, the allegations are undeniably to the contrary, and the extensive federal and state regulation of hazardous waste supports the claim of the necessity of control, as well as effective management. Particularly on the federal level, the recognition of hazardous waste as a significant and serious threat separate and apart from solid waste, is evident in the multitude of comprehensive laws which have been passed by Congress since the mid-1970's. Beginning in 1976, Congress enacted the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§6901-6987, which established a "cradle to grave" regulatory scheme for hazardous waste. Also in 1976, Congress enacted the Toxic Substances Control Act of 1976 (TSCA), Pub. L. 94-469, which was a comprehensive measure designed to protect the public and the environment from exposure to hazardous chemicals. In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§9601-9675, which provided for the cleanup of hazardous waste sites and created the Superfund, a federal fund for cleanup in the event responsible parties fail to do so. In the same year, and nearly three years after the Court's decision in *City of Philadelphia*, U.S. EPA promulgated in excess of 1200 pages

of federal regulations which govern extensively state waste management programs under RCRA. In 1986, Congress amended CERCLA by enacting the Superfund Amendments and Reauthorization Act (SARA), Pub. L. 99-499, amending certain sections of CERCLA to ensure, among other things, that states assumed responsibility for developing or contracting for adequate hazardous waste capacity for the next twenty year period through the siting of newer and safer facilities.¹ Finally, in 1984, Congress passed the Hazardous and Solid Waste Amendments, Pub. L. 98-616 which, in further recognition of the inherent dangers of landfilling hazardous wastes, established a comprehensive program to regulate and restrict the land disposal of hazardous wastes. With regard to the transportation of hazardous waste, Congress enacted the Hazardous Materials Transportation Act of 1974, 49 U.S.C. 1801, et seq., which preempted the field in the important area of hazardous waste transportation regulation. These federal developments compel the conclusion that any reliance on *City of Philadelphia* as governing management of hazardous waste, the very movement (let alone disposal) of which poses recognized and pervasively regulated dangers, is misplaced. Given the persistent misapplication of the Court's opinion in *City of Philadelphia*, the instant case serves as the opportunity for the Court to resolve confusion in the law and to afford reasonable protections to states which have sited or plan to site hazardous waste facilities.

II. A State May, Under Its Police Powers, Restrict The Importation Of Articles Which Pose

¹ See, for example, H. Rep. No. 99-69, May 7, 1985 (H.R. 2005); H. Rep. No. 99-253(I), Aug. 1, 1985 (H.R. 2817); H. Rep. No. 99-253(II), Oct. 28, 1985 (H.R. 2817); H. Rep. No. 99-253(III), Oct. 31, 1985 (H.R. 2817); H. Rep. No. 99-253(IV) Oct. 31, 1985 (H.R. 2817); H. Rep. No. 99-253(V), Nov. 12, 1985 (H.R. 2817); S. Rep. No. 99-11, Mar. 18, 1985 (S. 51); S. Rep. No. 99-73, May 23, 1985 (S. 51); H. Conf. Rep. No. 99-962, Oct. 3, 1986 (H.R. 2005); H. Rep. No. 99-255, Sept. 4, 1985 (H.R. 3065). Despite the clear intent of these amendments, certain states still refuse to provide for their own disposal needs, deciding instead to burden states like Alabama with their wastes.

Health, Safety And Environmental Risks.

Despite the inapplicability of *City of Philadelphia* to the dangerous hazardous waste arena, this case is nonetheless governed by well-settled law. As recognized by the Alabama Supreme Court, hazardous waste, as an item bearing striking resemblance to the permissible items of quarantine in long-standing precedent of this Court, is not worthy of traditional Commerce Clause protections. In fact, Chief Justice Rehnquist would have upheld New Jersey's ban under the quarantine cases in his dissent in *City of Philadelphia*:

[S]tates can prohibit the importation of items " 'which, on account of their existing condition, would bring in and spread disease, pestilence and death . . .'"

City of Philadelphia, at 632 (Rehnquist, J. dissenting). This dissent is consistent with a multitude of earlier U.S. Supreme Court cases which hold that a state may, under its police powers, restrict the importation of articles which pose threats to the health and safety of its citizens and to its environment.²

In its most recent articulation of the quarantine logic, *Maine v. Taylor*, the Court indicated that such laws are not considered impermissible protectionist measures even though they are directed against out-of-state commerce. The Court never questioned whether Maine could restrict the importation of baitfish for the stated purpose of insulating its domestic baitfish crop from the harms posed by the introduction of damaging parasites. Although the statute facially discriminated against the interstate transportation of live baitfish, the Court upheld the ban as a reasonable means of accomplishing a legitimate state goal. See also, Brief of Amicus Curiae, Whatcom County, in Support of Respondents,

² *Asbell v. Kansas*, 209 U.S. 251 (1908); *Compagnie Francaise v. State Board of Health, Louisiana*, 186 U.S. 380 (1902); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Bowman v. Chicago and Northwestern R. Co.*, 125 U.S. 465 (1888).

In *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, No. 91-636, at 23-27 (explanation of appropriate test to employ in quarantine situations).

In *Maine v. Taylor*, the court recognized that the Commerce Clause does not prevent states from regulating substances where their risks are known. The Court explained this principle as follows:

"Not all intentional barriers to interstate commerce are protectionist, however, the commerce clause 'is not a guaranty of the right to import into a state whatever one may please, absent a prohibition by Congress, regardless of the effects of the importation upon the local community.'"

477 U.S. at 148, n. 19. The Court, speaking through Justice Blackmun, also recognized the practical limitations of the Commerce Clause where *unknown* environmental risks are clearly at issue, stating as follows:

". . . Maine has a legitimate interest in guarding against imperfectly understood environmental risk, despite the possibility that they may ultimately prove to be negligible. [T]he constitutional principles underlying the Commerce Clause cannot be read as requiring the State of Maine to sit idly by and wait until potential irreversible environmental damage has occurred . . ."

477 U.S. at 148. Therefore, subsequent to *City of Philadelphia*, the Court has recognized that states may also regulate substances where their risks are imperfectly understood, so long as the legitimate interests of the states in this regard could not be served as well by available nondiscriminatory means. *Maine v. Taylor*, 477 U.S. at 150.

The dangers of hazardous waste consist of both known and imperfectly understood risks. The breadth and technicality of hazardous waste disposal and transportation regulations demonstrate that many of the risks inherent in

transportation and land disposal are known. On the other hand, it is virtually impossible to predict exactly what will happen in the future of any hazardous waste landfill. Because experts generally agree that hazardous waste has a toxic life of about 5,000 years, nearly all of recorded history will double before we will be able to quantify the total risks which potentially stem from the siting of these facilities. Therefore, the rationale of *Maine v. Taylor* applies with great force to hazardous waste regulation to establish that hazardous waste, which the trial court found contained "poisonous and cancer causing chemicals and which can cause birth defects, genetic damage, blindness, crippling and death", are to be treated more like articles which spread "disease, pestilence and death"³, than like desirable and ordinary items of commerce such as milk⁴, apples⁵ and wine⁶. In this regard it is clear, even under *City of Philadelphia*, that states may restrict or even ban articles which spread "disease, pestilence and death"; the value of commerce in such articles is outweighed by the inherent dangers. *City of Philadelphia*, *supra*, at 622. "The self-protecting power of each State, therefore, may be rightfully observed against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution." *Bowman*, *supra*, at 489. Substantial dangers to public health, safety, and the environment of the state arising from the transportation and burial of hazardous waste were detailed by the court below. Under *Maine v. Taylor*, these dangers must be weighed against the values of unrestricted interstate commerce, in this case unrestricted importation of hazardous, toxic and dangerous waste materials for landfilling. Consequently, the solid waste

³ *City of Philadelphia v. New Jersey*, 437 U.S. 617, 631 (1978) (Rehnquist, J. dissenting), quoting, *Bowman*, *supra*, at 489).

⁴ *Dean Milk Company v. Madison*, 340 U.S. 349 (1951).

⁵ *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977).

⁶ *Bacchus Imports, Limited v. Dias*, 468 U.S. 263 (1984).

principles set forth in *City of Philadelphia* should not be applied to hazardous waste.

Thus, given that the states have a recognized police power-based interest in restricting unlimited hazardous waste imports, the second prong of *Maine v. Taylor* requires only that the subject state's purposes could not be satisfied by available nondiscriminatory means. As noted by the Alabama Supreme Court, the differential fee is the means by which Alabama's citizens can be directly compensated for the health and safety risks not assumed by the out-of-state generator and for environmental dangers resulting from disposal and transportation of such waste. The *Amici* submit that such a fee is the least intrusive means by which Alabama can recoup the myriad of "costs" it has assumed by stepping up to its duty to manage its own waste.

Notably, and despite the acknowledged dangers of hazardous waste (including both known and imperfectly understood risks under the language of *Maine v. Taylor*) the instant case does not seek a total ban on the interstate transportation of hazardous waste. In fact, it has been Alabama's goal all along not to isolate itself from other states' hazardous waste disposal problems. Alabama is merely seeking the dual goals of limiting the *volume* of waste which any facility is obligated to accept, and encouraging a more equitable national sharing of responsibility for hazardous waste management through regional cooperation and workable and enforceable siting criteria. These goals can be accomplished through a recognition of the peculiar dangers posed by intrinsically dangerous hazardous waste, and a clarification of the limits of the rules set forth in *City of Philadelphia* so as to allow environmentally responsible states to protect themselves from states which continue to ignore their fair share of the nation's hazardous waste burden. As discussed at great length by the court below, the means chosen by Alabama of a differential fee satisfies the second prong of *Maine v. Taylor* in that it is the *only* means by which Alabama can accomplish the goal of "compensating" its citizens, while still accommodating out-of-state waste.

In sum, *Maine v. Taylor* provides a viable vehicle by which this Court should uphold the decision of the Alabama Supreme Court. Alabama as well as other similarly situated states must be permitted to reasonably regulate commerce to protect and compensate their citizens for the health and environmental risks posed by the hazardous wastes imported from states which have chosen not to accept the responsibility for the substantial environmental and financial liabilities their citizens and industries generate.

III. The Lack Of Control Possible Over Out-Of-State Waste Streams Justifies Disparate Treatment Of Those Streams.

As noted previously, *City of Philadelphia* was decided in 1978, nearly three full years before the U.S. EPA enacted the RCRA regulations which encompass well over 1200 pages in the Code of Federal Regulations. Regardless of the wisdom of New Jersey's actions from 1975 to 1978, the world of environmental regulation dramatically changed with the promulgation of these regulations in 1980. 45 Fed. Reg. 12722 (Feb. 26, 1980) and 45 Fed. Reg. 33066 (May 19, 1980). Two of the key features of the 1980 regulations were the definition of "hazardous waste" as a unique subset of "solid waste", see 40 C.F.R. 261.3, and the required disposal of hazardous waste only at the facilities specifically permitted to handle not only hazardous waste, but also the type of hazardous waste proposed to be disposed. See, generally, 40 C.F.R. Parts 264 and 265.

In order to operate their own hazardous waste programs, states were required to develop hazardous waste management programs which met the minimum federal standards set forth at 40 C.F.R. Part 271. Of particular importance to this case was the requirement set forth at 40 C.F.R. 271.15 that states have inspection and surveillance authority to ensure that hazardous waste would be disposed of only at properly equipped and permitted facilities. Specifically, U.S. EPA's regulations required, in part, as follows:

(b) State programs shall have inspection and surveillance procedures to determine, independent of information supplied by regulated persons, compliance or noncompliance with applicable program requirements.

40 C.F.R. 271.15. The reason for the requirement that states must be able to conduct inspections, evaluations, and investigations to independently verify the accuracy of information submitted by the regulated community is inherent in the federal regulatory system. Specifically, many of U.S. EPA's "listed" hazardous wastes are source-specific and their listing as hazardous is based upon the manufacturing processes of the generator of the waste. See 40 C.F.R. 261.30 through 261.35. For example, "k001" hazardous waste, 40 C.F.R. 261.32, is "bottom sediment sludge from the bottom of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol." Thus, a state regulatory inspector when confronted with an industrial sludge imported for disposal will need to know whether that sludge came from a generator source in the wood preservative industry, and whether creosote or pentachlorophenol was used by the generator. Another example is the land disposal restriction contained in the federal regulations at 40 C.F.R. 268, *et seq.* These regulations underscore the importance of the correct identification of hazardous wastes based on the nature of their generation by providing specific chronological milestones, after which a multitude of dangerous hazardous wastes may no longer be land disposed in any manner. Thus, the lack of state control over an out-of-state generator not only compromises the RCRA verification requirement for state programs, but also presents yet another opportunity for states to improperly dispose of unidentified hazardous waste in landfills in other states in ways that violate the land ban restrictions.

Despite the development of this pervasive federal scheme which requires that states independently verify and restrict certain hazardous waste from land disposal even where they have virtually no control over out-of-state generators, *City of Philadelphia* continues to be anachronistically cited for

the proposition (improperly conceded therein by New Jersey) that there are no differences between out-of-state and in-state waste streams which justify disparate treatment. In reality, because waste streams are streams rather than commodities, the fact that one stream remains totally in-state while another crosses state boundaries is itself a difference in kind justifying disparate treatment. The control which state governments may exercise over intrastate waste streams serves several functions, including ensuring that no improper waste enters the stream (not all hazardous waste facilities are equipped to handle all of the hundreds of types of hazardous waste), that disposal habits are changed so that only certain types of waste enter the stream (e.g., recyclables and compostables removed), and that the waste is handled and transported all along the stream so there is the least possible threat to health and environment. As required by RCRA, an intrastate waste stream may be regulated, inspected and controlled from point of generation to point of disposal. Practically speaking, a waste stream which originates out of state cannot be easily inspected at the point of generation or controlled by the state which will assume ultimate disposal burdens. However, the need for some sort of state control over interstate hazardous waste is not limited to RCRA considerations. In fact, the waste management policies which may be evident in state law or formal expressions of state agency policies can be ignored, if not outright defeated, by out-of-state waste generators.

When, for example, the disposal state's expressed concern is minimizing environmental harm by toxics use reduction, it is possible to rigorously inspect for compliance close at home with regard to both the nature of the waste itself, and in the manner of its generation. Thus, it is the control over what goes into the stream that ensures against the risk of improper disposal. A disposal state cannot impose such control over out-of-state generators. Not only might it be considered an infringement upon another state's sovereignty for a disposal state to insist that its waste management policies and obligations be satisfied by foreign generators, such efforts would also likely prove to be cost and manpower prohibitive. However, the disposal state should be able to

legitimately insist that only hazardous waste streams which have been fully and completely regulated according to the standards of the receiving state be entitled to disposal within such state. By more directly authorizing state restrictions on out-of-state generated streams, this Court would recognize the legitimate interest in minimizing the health and safety concerns associated with such streams. A state which does not have control over the complete waste stream should not be placed at risk by that waste stream, or be generally obligated to accept such waste irrespective of the waste management policies or hierarchies imposed on the receiving state's own citizens. If, for example, the purpose of state regulation is to affect disposal habits by encouraging recycling, waste reduction, etc., it is virtually impossible to impose such values on the source of an out-of-state generated stream. Nevertheless, when a state creates hazardous landfill space on condition that only waste which has been through a certain amount of recycling, waste reduction, etc., is accepted for disposal, the disposal state has a right to ensure, by imposing its own standards and conducting inspections by its own personnel, that such conditions have been met at the point of generation. Out-of-state generated streams never are capable of being fully subject to such rigorously imposed disposal state requirements.

The Court should recognize that allowing restrictions on out-of-state generated streams merely recognizes that the disposal state does not have power to impose the same type of controls over waste others generate that it may impose over wastes which are its own inherent responsibility. The less burdensome alternative of a tipping fee such as that charged by Alabama is clearly sustainable as a way of compensating the importing state for the risks and burdens which the exporting state is not obligated or has chosen not to assume. As recognized by certain lower courts, it is impractical to assume that inspectors in the state of generation of waste can be relied upon by the state into which the waste is brought for disposal. *Government Suppliers Consolidating Services, Inc. v. Bayh*, 743 F. Supp. 739 (S.D. Ind. 1990). Further, the absence of state control

over hazardous waste generated in other states serves to underscore the victimization which has occurred of states which have aggressively developed their own vigorous waste management policies, which other states, clothed with *City of Philadelphia*, remain free to ignore. *City of Philadelphia* should not be used as a sword by operators intent only on profits or by those states which cavalierly ignore the strides made by responsible states to manage and plan for their own hazardous waste disposal in a manner consistent with RCRA, nor as a means by which exporting states can ignore the waste management and/or minimization policies of other states.

IV. Additionally, The Court Should Take Advantage Of The Opportunity Herein Presented To Overrule *City of Philadelphia*.

As demonstrated above, *City of Philadelphia* does not control hazardous waste cases. Nevertheless, because the *City of Philadelphia* analysis has infected this area of state waste planning, the *Amici* states respectfully submit that this hazardous waste case presents an excellent opportunity for this Court to overrule *City of Philadelphia*. The *City of Philadelphia* implication that disposal facilities are natural resources is simply wrong. Additionally, limitations placed by a state on disposal facilities do not interfere with protected national economics. In fact, it is the contorted applications of *City of Philadelphia* which have resulted in the failure of the siting process for hazardous waste facilities across the nation, and which run counter to Congress' expression of policy in the Superfund Amendments and Reauthorization Act of 1986. In enacting these Amendments, Congress declared:

A critical step in the implementation of a rational, safe hazardous waste program is the creation of new [hazardous waste disposal] facilities.

132 Cong. Rec. S. 14,924 (daily ed. Oct. 3, 1986). Further,

Congress was concerned that certain states,

because of political pressures and public opposition, were not able to create and to permit sufficient facilities within their borders to treat and securely dispose of (or manage) the amounts of wastes produced in those states."

Office of Solid Waste and Emergency Response, U.S. EPA, Assurance of Hazardous Waste Capacity: Guidance to State Officials. Later, Congress declared that the broader policy of the SARA was to maximize the national "economy" for hazardous waste by enacting measures designed to encourage the siting of disposal facilities despite political pressures in opposition:

Pressures from local citizens place the political system in an extremely vulnerable position . . . The broader social need for safe hazardous waste management facilities often has not been strongly represented in the . . . process [of siting new facilities]. A common result has been . . . no significant increase in hazardous waste capacity over the past several years.

S. Rep. No. 11, 99th Cong., 1st Sess. 22 (1985).

In keeping with these policies, leaving the states free to negotiate the terms upon which they will accept other sovereign's disposal liabilities will better encourage the siting of facilities than Petitioner's "solution" of allowing any sited and existing facility to maximize private profit at the expense of state and regional planning. To the extent *City of Philadelphia* may be read to prohibit states from focusing primarily on their own hazardous waste disposal obligations and allowing disposal of other states' hazardous waste only on terms which truly reflect the obligation imposed, *City of Philadelphia* should be overruled.

A. The Fee Issues Before The Court In This Case Cannot Be Completely Divorced From Other Lower Court Decisions Which Have Used *City of Philadelphia* To Improperly Limit A State's

Ability To Solve Its Hazardous Waste Problems.

While the sole issue for which this Court has granted *certiorari* is the constitutionality of the fee imposed on hazardous waste coming into Alabama for disposal, the instant litigation has a larger history and context. Petitioner, for example, erroneously attempts to argue that the history of the Holley bill and other Alabama attempts to protect the health and environment of Alabama citizens amount to repeated efforts of economic protectionism. In fact, it has been Alabama's goal *not* to isolate itself from other states' hazardous waste disposal problems. Cf., *NSWMA v. Alabama Department of Environmental Management*, 729 F. Supp. 792, 804-805, (N.D. Ala. 1990) (Alabama facilities open to all states which plan for their hazardous waste disposal through in-state siting or interstate or regional agreements). Unfortunately, in *NSWMA v. Alabama Department of Environmental Management*, 910 F. 2d 713 (11th Cir. 1990), *cert denied* ___ U.S. ___ (1991), the Eleventh Circuit reversed and held unconstitutional Alabama's program of making its disposal capacity available only to those states which also had shouldered their hazardous waste management burdens by either entering into compacts or establishing RCRA approved siting programs. In other words, the Eleventh Circuit's contention that *City of Philadelphia* compels a state to grant access for waste originating in states which have not shouldered any of their hazardous waste management obligations, despite federal legislation approving such compacts, (see Note, "Constitutionally Mandated Southern Hospitality: National Solid Wastes Management Association and Chemical Waste Management, Inc. v. Alabama Department of Environmental Management," 60 N. Carolina L. Rev. 1001, 1017 (1991)), exacerbates the "Hobson's choice" facing states which wish to responsibly manage waste on a regional basis, but do not desire to become the dumping ground for all the nation's hazardous waste problems. See, 437 U.S. at 631 (Rehnquist, J., dissenting). A ruling by the Court either that *City of Philadelphia* does not apply to hazardous waste disposal or that the *City of Philadelphia* case was wrongly decided would enable Alabama and other

states interested in entering into regional hazardous waste disposal agreements to do so without fear that any facility sited will receive unlimited amounts of waste which a "free-rider" generating state simply did not wish to manage.

B. Hazardous Waste Disposal Facilities Are Not Natural Resources.

The current relative scarcity of hazardous waste disposal facilities is an artificial rather than geologic phenomenon. Petitioner erroneously implies that U.S. EPA location restrictions make it impossible for hazardous waste disposal facilities to be sited in other parts of the nation. Petitioner's Brief at 4, 7-8. In fact, the U.S. EPA location standards contained at 40 C.F.R. Section 264.18 prohibit hazardous waste facilities only within 200 feet of a Holocene fault and in salt formations and underground mines and caves. As Appendix VI to 40 C.F.R. Part 264 graphically demonstrates, the number of locations seismically inappropriate is a finite and relatively limited number. Whatever may be the "benefits" of the underlying chalk formation associated with the Emelle facility, the *Amici* states emphasize that the main reason additional hazardous waste facilities have not been sited has nothing to do with geology, but instead involves local politics and legitimate state fears (based on their observation of what has happened at facilities such as Emelle) that any sited facility will become an uncontrolled dumping ground for the entire nation's hazardous waste problems.

The point is that every state, including those of the *Amici* states which do not currently have hazardous waste landfills within their boundaries, is geologically capable of supporting a hazardous waste disposal landfill under the EPA regulations. All such facilities are primarily manufactured rather than geological phenomena. See, e.g. 40 C.F.R. §264.301 (design requirements); Cf., Cox, Burying Misconceptions About Trash and Commerce: Why It Is Time To Dump *Philadelphia v. New Jersey*, 20 Cap. U. L. Rev. 813, 820-22 (1991) (landfills are manufactured phenomena sited primarily by political factors.) The reason so few hazardous waste facilities currently are in existence is because people

do not want such facilities near where they live and work. States which otherwise might override local fears are legitimately reluctant to do so without guarantees that they can have some important say-so over how much waste from what locations goes into those facilities. *Cf. Swin Resources v. Lycoming County*, 883 F. 2d 245, 253-54, n. 3 (3rd Cir. 1989); (difficulty and burdens involved in siting disposal facilities implies need for some control over facilities by residents affected); Comment, "Recycling *Philadelphia v. New Jersey*: The Dormant Commerce Clause, Post-Industrial 'Natural' Resources and the Solid Waste Crisis," 137 U. Pa. L. Rev. 1309, 1328-36 (1989) (burdens associated with landfills should be compensated by some form of benefit or control); See also generally, Note, "Mandated Southern Hospitality," *supra*, 69 N. Carolina L. Rev. 1001. So long as lower courts are capable of holding that state controls on out-of-state hazardous waste might violate *City of Philadelphia*, few additional disposal facilities will be sited.

C. No Significant National Economic Goals Are Furthered By Prohibiting States From Controlling The Inflow Of Out-Of-State Hazardous Waste.

Petitioner's sole goal is maximizing *private* economic profit. While there is nothing necessarily immoral about this, Petitioner's desire to make the most money possible should not be confused with the economic protectionism and interference with other states' business which the dormant Commerce Clause sometimes prohibits. What Petitioner offers for sale is airspace --- space within its landfill for disposal of hazardous materials. Petitioner's competitors thus are other disposal facilities located in other states. Most dormant Commerce Clause challenges involve a state attempting to put "its" businesses in a more favorable competitive situation than out-of-state competitors. Obviously, Petitioner does not contend that this is what Alabama is doing in the instant case. In fact, Alabama's disposal fee arguably benefits out-of-state hazardous waste

disposal competitors, by making it relatively less expensive to dispose at facilities other than Emelle.⁷

In addition, and as Petitioner concedes, economics of scale generally lead to lower disposal costs. See Petitioner's Brief at 6-7. To the extent the fee here at issue deters volume (and it is Petitioner's contention that this is the effect of the fee) Alabama-based disposal facilities which receive significantly less hazardous waste would *raise* their disposal fees accordingly. In other words, as an end result of the fee which is being litigated, Emelle would become even less attractive to both in-state and out-of-state generators.

In short, economic protectionism is not the purpose or goal of the fee at issue here. What is instead at issue is whether a state which allows a hazardous waste disposal facility to be created within its boundaries may impose burdens and place limits on that disposal capacity, thereby reducing the amount of out-of-state waste which is shipped to the facility. As the trial court found, the risks and environmental dangers associated with hazardous waste disposal, even under rigorous EPA and state regulations, are real. Given that a state is mandated under CERCLA and RCRA to manage only its own hazardous waste, a state should be free to impose terms on out-of-state waste that compensate for the real environmental burdens associated with that waste disposal. See Note, "Mandated Southern Hospitality," *supra*, 69 N. Carolina L. Rev. 1001; *cf.* Comment, "Recycling *Philadelphia*," *supra*, 137 U. Pa. L. Rev. at 1328-36.

Since hazardous waste landfills are not natural resources, and since the purpose and effect of the Alabama legislation here at issue is not economic protectionism but safeguarding the health and environment of Alabama citizens, the fee here

⁷ If Petitioner's claim of lost volume is true, this illustrates both that Petitioner's sole complaint is lost revenue and that the Emelle facility is not uniquely necessary for hazardous waste disposal as Petitioner implies. The hazardous waste formerly destined for Emelle must have ended up at Petitioner's competitors' facilities.

being challenged should be upheld. As previously argued, *Maine v. Taylor*, the quarantine line of cases and the unique problems associated with hazardous waste all provide adequate authority for distinguishing this case from *Philadelphia v. New Jersey* and affirming the decision of the Alabama Supreme Court. Nevertheless, because language in *City of Philadelphia* improperly implies that waste disposal facilities are natural resources that can be hoarded, and because the *City of Philadelphia* rationale of no interference based on state of origin (even in litigation related to the instant case, see *NSWMA v. Alabama DEM, supra.*) has been applied to unduly limit states in their hazardous waste management operations, the *Amici* states respectfully submit that *City of Philadelphia* should be overruled. States managing their own hazardous waste do not violate the Constitution when they stop the flow of hazardous waste at their borders or impose fees or regulations on hazardous waste that originates from out of state.

CONCLUSION

The *Amici* states respectfully submit that this honorable Court should affirm the decision of the Alabama Supreme Court under the authority of *Maine v. Taylor*. In the alternative, the *Amici* states assert that this Court should determine that the pervasive regulation of hazardous waste, and the attendant interests of the sovereign states in such regulation, warrants that interstate dealings in dangerous waste be treated uniquely. Specifically, the *Amici* submit that states should be given clear authority to regulate the interstate movement of waste which poses threats to human health and safety and possesses the potential to become a severe environmental and financial liability to such states.

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APPENDIX A

40 C.F.R. §271.15 Requirements for compliance evaluation programs.

(a) State programs shall have procedures for receipt, evaluation, retention and investigation for possible enforcement of all notices and reports required of permittee and other regulated persons (and for investigation for possible enforcement failure to submit these notices and reports).

(b) State programs shall have inspection and surveillance procedures to determine, independent of information supplied by regulated persons, compliance or noncompliance with applicable program requirements. The State shall maintain:

(1) A program which is capable of making comprehensive surveys of all facilities and activities subject to the State Director's authority to identify persons subject to regulation who have failed to comply with permit application or other program requirements. Any compilation, index, or inventory of such facilities and activities shall be made available to the Regional Administrator upon request;

(2) A program for periodic inspections of the facilities and activities subject to regulation. These inspections shall be conducted in a manner designed to:

(i) Determine compliance or noncompliance with issued permit conditions and other program requirements;

(ii) Verify the accuracy of information submitted by permittees and other regulated persons in reporting forms and other forms supplying monitoring data; and

(iii) Verify the adequacy of sampling, monitoring, and other methods used by permittees and other

regulated persons to develop that information;

(3) A program for investigations information obtained regarding violations of applicable program and permit requirements; and

(4) Procedures for receiving and ensuring proper consideration of information submitted by the public about violations. Public effort in reporting violations shall be encouraged, and the State Director shall make available information on reporting procedures.

(c) The State Director and State officers engaged in compliance evaluation shall have authority to enter any site or premises subject to regulation or in which records relevant to program operation are kept in order to copy any records, inspect, monitor or otherwise investigate compliance with the State program including compliance with permit conditions and other program requirements. States whose law requires a search warrant before entry conform with this requirement.

(d) Investigatory inspections shall be conducted, samples shall be taken and other information shall be gathered in a manner (e.g., using proper "chain of custody" procedures) that will produce evidence admissible in an enforcement proceeding or in court.

APPENDIX B**40 C.F.R. §264.18 Location Standards.**

(a) Seismic considerations. (1) Portions of new facilities where treatment, storage, or disposal of hazardous waste will be conducted must not be located within 61 meters (200 feet) of a fault which has had displacement in Holocene time.

(2) As used in paragraph (a)(1) of this section:

(i) "Fault" means a fracture along which rocks on one side have been displaced with respect to those on the other side.

(ii) "Displacement" means the relative movement of any two sides of a fault measured in any direction.

(iii) "Holocene" means the most recent epoch of the Quaternary period, extending from the end of the Pleistocene to the present.

[Comment. Procedure for demonstrating compliance with this standard in Part B of the permit application are specified in §270.1(b)(11). Facilities which are located in political jurisdictions other than those listed in Appendix VI of this part, are assumed to be in compliance with this requirement.]

(b) Floodplains. (1) A facility located in a 100-year floodplain must be designed, constructed, operated, and maintained to prevent washout or any hazardous waste by a 100-year flood, unless the owner or operator can demonstrate to the Regional Administrator's satisfaction that:

(i) Procedures are in effect which will cause the waste to be removed safely, before flood waters can reach the facility, to a location where the wastes will not be vulnerable to flood waters; or

(ii) For existing surface impoundments, waste piles, land treatment units, landfills, and miscellaneous units,

no adverse effects on human health or the environment will result if washout occurs, considering;

(A) The volume and physical and chemical characteristics of the waste in the facility;

(B) The concentration of hazardous constituents that would potentially affect surface waters as a result of washout;

(C) The impact of such concentrations on the current or potential uses of water and quality standards established for the affected surface waters; and

(D) The impact of hazardous constituents on the sediments of affected surface wastes or the soils of the 100-year floodplain that could result from washout.

[Comment: The location where wastes are moved must be a facility which is either permitted by EPA under Part 270 of this chapter, authorized to manage hazardous waste by a State with a hazardous waste management program authorized under part 271 of this chapter, or in interim status under parts 270 and 300 of this chapter.]

(2) As used in paragraph (b)(1) of this section:

(i) "100-year floodplain" means any land area which is subject to a one percent or greater chance of flooding in any given year from any source.

(ii) "Washout" means the movement of hazardous waste from the active portion of the facility as a result of flooding.

(iii) "100-year flood" means a flood that has a one percent chance of being equalled or exceeded in any given year.

[Comment: (1) Requirements pertaining to other Federal laws which affect the location and permitting of facilities are found in §270.3 of this chapter. For details relative to these laws, see EPA's manual for SEA (special environmental area) requirements for hazardous waste facility permits. Though EPA is responsible for complying with those requirements, applicants are advised to consider them in planning the location of a facility to help prevent subsequent project delays.]

(c) Salt dome formations, salt bed formations, underground mines and caves. The placement of any noncontainerized or bulk liquid hazardous waste in any salt dome formation, salt bed formation, underground mine or cave is prohibited, except for the Department of Energy Waste Isolation Pilot Project in New Mexico.

APPENDIX C

40 C.F.R. Part 264

Appendix VI - Political Jurisdictions in Which Compliance With §254.18(a) Must Be Demonstrated

Alaska

Aleutian Islands	Kodiak
Anchorage	Lynn Canal-Icy Straits
Bethel	Palmer-Wassilla-Talkeena
Bristol Bay	Seward
Cordova-Valdez	Sitka
Fairbanks-Fort Yukon	Wade Hampton
Juneau	Wrangell Petersburg
Kenai-Cook Inlet	Yukon-Kuskokwim
Ketchikan-Prince of Wales	

Arizona

Cochise	Greenlee
Graham	Yuma

California

All

Colorado

Archuleta	Mineral
Conejos	Rio Grande
Hinsdale	Saguache

Hawaii

Hawaii

Idaho

Bannock	Franklin
Bear lake	Fremont
Bingham	Jefferson
Bonneville	Madison
Caribou	Oneida
Cassia	Power
Clark	Teton

Montana

Beaverhead
Broadwater
Cascade
Deer Lodge
Flathead
Gallatin
Granite
Jefferson
Lake
Lewis and Clark
Madison

Nevada

All

New Mexico

Bernalillo
Catron
Grant
Hidalgo
Los Alamos
Rio Arriba
Sandoval

Utah

Beaver
Box Elder
Cache
Carbon
Davis
Duchesne
Emery
Garfield
Iron
Juab
Millard
Morgan

Meagher
Missoula
Park
Powell
Sanders
Silver Bow
Stillwater
Sweet Grains
Teton
Wheatland

Sante Fe
Sierra
Socorro
Taos
Torrance
Valencia

Piute
Rich
Salt Lake
Sanpete
Sevier
Summit
Tooele
Utah
Wasatch
Washington
Wayne
Weber

Washington

Chelan
Clallam
Clark
Cowlitz
Douglas
Ferry
Grant
Grays Harbor
Jefferson
King
Kitsap
Kittitas
Lewis

Mason
Okanogan
Pacific
Pierce
San Jaun Islands
Skagit
Skamania
Snohomish
Thurston
Wahkiakum
Whatcom
Yakima

Wyoming

Fremont
Lincoln
Park
Sublette

Teton
Uinta
Yellowstone National Park

¹ These include counties, city-county consolidations, and independent cities. In the case of Alaska, the political jurisdictions are election districts, and in the case of Hawaii, the political jurisdiction listed is the Island of Hawaii.

APPENDIX D

40 C.F.R. §264.301 Design and operating requirements

(a) Any landfill that is not covered by paragraph (c) of this section or §265.301(a) of this chapter must have a liner system for all portions of the landfill, (except for existing portions of such landfill). The liner system must have:

(1) A liner that is designed, constructed, and installed to prevent any migration of wastes out of the landfill to the adjacent subsurface soil or ground water or surface water at any time during the active life (including the closure period) of the landfill. The liner must be constructed of materials that prevent wastes from passing into the liner during the active life the facility. The liner must be:

(i) Constructed of materials that have appropriate chemical properties and sufficient strength and thickness to prevent failure due to pressure gradients (including static head and external hydrogeologic forces), physical contact with the waste or leachate to which they are exposed, climatic conditions, the stress of installation, and the stress of daily operation;

(ii) Placed upon a foundation or base capable of providing support to the liner and resistance of pressure gradients above and below the liner to prevent failure of the liner due to settlement, compression, or uplift; and

(iii) Installed to cover all surrounding earth likely to be in contact with the waste or leachate; and

(2) A leachate collection and removal system immediately above the liner that is designed, constructed, maintained, and operated to collect and remove leachate from the landfill. The Regional Administrator will specify design and operating conditions in the permit to ensure that the leachate depth

over the liner does not exceed 30 cm (one foot). The leachate collection and removal system must be:

(i) Constructed of materials that are:

(A) Chemically resistant to the waste managed in the landfill and the leachate expected to be generated; and

(B) Of sufficient strength and thickness to prevent collapse under the pressures exerted by overlying wastes, waste cover materials, and by any equipment used at the landfill; and

(ii) Designed and operated to function without clogging through the scheduled closure of the landfill.

(b) The owner or operator will be exempt from the requirements of paragraph (a) of this section if the Regional Administrator finds, based on a demonstration by the owner or operator, that alternative design and operating practices, together with location characteristics, will prevent the migration of any hazardous constituents (see §264.93) into the ground water or surface water at any future time. In deciding whether to grant an exemption, the Regional Administrator will consider:

(1) The nature and quantity of the wastes;

(2) The proposed alternate design and operation;

(3) The hydrogeologic setting of the facility, including the attenuative capacity and thickness of the liners and soils present between the landfill and ground water or surface water; and

(4) All other factors which would influence the quality and mobility of the leachate produced and the potential for it to migrate to ground water or surface water.

(c) The owner or operator of each new landfill, each new landfill unit, and each lateral expansion of an existing landfill unit, must install two or more liners and a leachate collection system above and between the liners. The liners and leachate collection systems must protect human health and the environment. The requirements of this paragraph shall apply with respect to all waste received after issuance of the permit for units where the part B of the permit application is received by the Regional Administrator after November 8, 1984. The requirement for the installation of two or more liners in this paragraph may be satisfied by the installation of a top liner designed, operated, and constructed of materials to prevent the migration of any constituent into such liner during the period such facility remains in operation (including any post-closure monitoring period), and a lower line designed, operated, and constructed to prevent the migration of any constituent through such liner during such period. For the purpose of the preceding sentence, a lower liner shall be deemed to satisfy such requirement if it is constructed of at least a 3-foot thick layer of recompacted clay or other natural material with a permeability of no more than 1×10^{-7} centimeter per second.

(d) Paragraph (c) of this section will not apply if the owner or operator demonstrates to the Regional Administrator, and the Regional Administrator finds for such landfill, that alternative design and operating practices, together with location characteristics, will prevent the migration of any hazardous constituents into the ground water or surface water at least as effectively as such liners and leachate collection systems.

(e) The double liner requirement set forth in paragraph (c) of this section may be waived by the Regional Administrator for any monofill, if:

(1) The monofill contains only hazardous wastes from foundry furnace emission controls or metal casting molding sand, and such wastes do not render the wastes hazardous for reasons other than the Toxicity Characteristic in §261.24 of this chapter, with EPA

Hazardous Waste Numbers D004 through D017; and

(2)(i)(A) The monofill has at least one liner for which there is no evidence that such liner is leaking.

(B) The monofill is located more than one-quarter mile from the underground source of drinking water (at that term is defined in §144.3 of this chapter; and

(C) The monofill is in compliance with generally applicable ground water monitoring requirements for facilities with permits under RCRA 3008(c); or

(D) The owner or operator demonstrates that the monofill is located, designed and operated so as to ensure that there will be no migration of any hazardous constituents into ground water or surface water at any future time.

(f) The owner or operator must design, construct, operate, and maintain a run-on control system capable of preventing flow onto the active portion of the landfill during peak discharge from at least a 25-year storm.

(g) The owner or operator must design, construct, operate, and maintain a run-off management system to collect and control at least the water volume resulting from at 24-hour, 25-year storm.

(h) Collection and holding facilities (e.g., tanks or basins) associated with run-on and run-off control systems must be emptied or otherwise managed expeditiously after storms to maintain design capacity of the system.

(i) If the landfill contains any particulate matter which may be subject to wind dispersal, the owner or operator must cover or otherwise manage the landfill to control wind dispersal.

(j) The Regional Administrator will specify in the permit all design and operating practices that are necessary to

ensure that the requirements of this section are satisfied.

(k) Any permit under RCRA §3005(c) which is issued for a landfill located within the State of Alabama shall require the installation of two or more liners and a leachate collection system above and between such liners, notwithstanding any other provision of RCRA.

APR 10 1992

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC.,
Petitioner,
v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA;
ALABAMA DEPARTMENT OF REVENUE; and
JAMES M. SIZEMORE, JR., COMMISSIONER OF THE
ALABAMA DEPARTMENT OF REVENUE,
Respondents.

On Writ of Certiorari to the
Supreme Court of Alabama

**BRIEF OF THE STATES OF SOUTH CAROLINA,
KANSAS, LOUISIANA, AND UTAH AS
AMICI CURIAE IN SUPPORT OF RESPONDENTS**

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QUESTION PRESENTED

Whether the excessive environmental burdens and costs attributable to disposal at landfills within Alabama of large quantities of hazardous waste generated outside Alabama, exacerbated by EPA's failure to provide for installation of new capacity for hazardous waste disposal in landfills, support higher fees for the disposal of that waste within the State.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

 No. 91-471

CHEMICAL WASTE MANAGEMENT, INC.,
Petitioner,
 v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA;
 ALABAMA DEPARTMENT OF REVENUE; and
 JAMES M. SIZEMORE, JR., COMMISSIONER OF THE
 ALABAMA DEPARTMENT OF REVENUE,
Respondents.

 On Writ of Certiorari to the
 Supreme Court of Alabama

**BRIEF OF THE STATES OF SOUTH CAROLINA,
 KANSAS, LOUISIANA, AND UTAH AS
 AMICI CURIAE IN SUPPORT OF RESPONDENTS**

Pursuant to this Court's Rule 37.5, the States of South Carolina, Kansas, Louisiana, and Utah respectfully submit this brief as *Amici Curiae* in support of Respondents Guy Hunt, Governor of the State of Alabama, the Alabama Department of Revenue ("ADR"), and James Sizemore, Jr., Commissioner of ADR.

**INTEREST OF THE STATES OF SOUTH CAROLINA,
 KANSAS, LOUISIANA, AND UTAH**

The States of South Carolina, Kansas, Louisiana, and Utah, like Alabama, are authorized by the U.S. Environmental Protection Agency ("EPA") to operate hazardous waste management programs "in lieu of" the fed-

eral program, pursuant to Section 3006(b) of the Resource Conservation and Recovery Act of 1976, as amended ("RCRA"), 42 U.S.C. § 6926(b), Appendix *infra*, at 1a. In granting its authorization for South Carolina's program, EPA specifically authorized South Carolina to levy a higher fee for disposal of out-of-state hazardous waste than for waste generated in-state. 50 *Fed. Reg.* 46,437 (Nov. 8, 1985), Appendix *infra*, at 4a. EPA authorized South Carolina's program in the face of a challenge to the differential fee brought by the Hazardous Waste Treatment Council ("HWTC") on federal statutory and Commerce Clause grounds.¹ HWTC raised its claims in the authorization proceedings before EPA; to be approvable, state programs must be "consistent" with federal law and regulations. RCRA § 3006(b), 42 U.S.C. § 6926(b), Appendix *infra*, at 1a; 40 C.F.R. §§ 271.4(a), Appendix *infra*, at 2a-3a, and 271.22-23. South Carolina thus has an interest in the propriety of Alabama's fees, although the South Carolina provision stands on a different legal and factual footing because it is an EPA-approved component, federally-enforceable, of the State's hazardous waste management program operating "in lieu of" the federal RCRA program. RCRA 3006, 42 U.S.C. § 6926, Appendix *infra*, at 1a.²

Alabama and South Carolina also have a community of interest as signatory states to the SARA Capacity Assurance Regional Agreement, entered in October 1989.³

¹ In the present case, HWTC and National Solid Wastes Management Association filed a brief *Amici Curiae* in support of Petitioner Chemical Waste Management, Inc. ("CWM") on March 12, 1992. A division of CWM, Trade Waste Incineration, is a member of HWTC.

² EPA also has approved hazardous waste management programs with differential fees in Ohio and Maine. See 54 *Fed. Reg.* 27,170 (June 28, 1989) (Ohio); 53 *Fed. Reg.* 16,264 (May 6, 1988) (Maine).

³ Tennessee and Kentucky are also signatories. North Carolina joined the Regional Agreement in November 1989, but it was later

The purpose of the regional agreement is "to provide the framework for a regional approach for the long-term management of hazardous waste." Regional Agreement, second paragraph of recitals. The Regional Agreement is expressly contemplated and encouraged by federal law—Section 104(c)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9604(c)(9).⁴

Moreover, South Carolina, like Alabama, is one of the few states to have a RCRA-permitted commercial hazardous waste landfill in operation.⁵ Only one new commercial hazardous waste landfill disposal facility has been permitted and has begun operation *anywhere* in the nation in the years since RCRA took effect.⁶ South Carolina, like Alabama, had a pre-RCRA facility in place that acquired "interim status" and then a RCRA permit as

automatically eliminated from the Agreement when it failed to site and permit new treatment and disposal capacity for hazardous wastes by dates specified in an addendum to the Agreement. See *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 786 n.8 (4th Cir. 1991).

⁴ See *infra*, p. 8 & n.10. CERCLA established the "Superfund" program to provide for remedies to be applied at facilities and properties that have been contaminated with hazardous substances and are the site of a release or threat of release of such substances. See 42 U.S.C. §§ 9601-9675.

⁵ Besides landfills, "land disposal" by statutory definition includes placement of hazardous waste in a "surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, or underground mine or cave." RCRA § 3004(k), 42 U.S.C. § 6924(k). See Brief for the United States as *Amicus Curiae*, at 6 n.8.

⁶ In the instant case, the trial court found that only one new landfill facility, to be located at Last Chance, Colorado, had been permitted since the effective date of RCRA in 1980 and that facility had never operated or accepted waste. J.A. 57a (¶ 4). However, that one facility finally was completed and began operation in the second half of 1991. See Chemical Marketing Reporter, November 18, 1991, at SR 12; USA Today, July 22, 1991, at 6A.

an existing facility. See RCRA § 3005(e), 42 U.S.C. § 6925(e). Because only one new commercial hazardous waste landfill has been permitted and begun operation, the few existing facilities that have remained in operation have been subjected to insupportable burdens. The states where these few facilities are located, including Alabama and South Carolina, have been forced to bear burdens that are vastly disproportionate to their needs, and to shoulder costs and detriments that other states, the great majority, have not had to carry.

Given these circumstances, South Carolina, Kansas, Louisiana, and Utah are in a position to provide a perspective which may assist the Court in evaluating the viability of differential fees for landfilling hazardous waste. Correspondingly, the States would benefit from a decision by this Court respecting the ability and power of states to tax and regulate disposal of hazardous waste under the legislative structure enacted by Congress and its regulatory implementation by EPA. See *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 785 n.2 (4th Cir. 1991).

ADDITIONAL STATUTES AND REGULATORY PROVISIONS INVOLVED

Pertinent portions of RCRA §§ 3006 and 3009, 42 U.S.C. §§ 6926 and 6929, governing authorized state hazardous waste regulatory programs, are set out in an Appendix to this brief, along with one of EPA's implementing regulations, 40 C.F.R. § 271.4. Also set out in the Appendix is 50 *Fed. Reg.* 46,437-440 (Nov. 8, 1985), the decision by EPA applying 40 C.F.R. § 271.4(a) in approving the South Carolina hazardous waste management program in which EPA addressed and expressly approved the provision imposing higher fees for the disposal within South Carolina of hazardous wastes generated outside the State.

SUPPLEMENTAL STATEMENT OF THE CASE

RCRA § 3006(b) provides that a state may be authorized to "administer and enforce a hazardous waste program" upon authorization from EPA. 42 U.S.C. § 6926(b), Appendix *infra*, at 1a. EPA *must* authorize the state program unless the Agency finds that it "is not equivalent to the Federal program," "is not consistent with the Federal or State programs applicable in other States," or "does not provide adequate enforcement of compliance with the requirements of [Sections 3001-3020 of RCRA]." *Id.* RCRA § 3009 empowers states to promulgate hazardous waste laws and regulations "which are more stringent than those imposed by [RCRA]," and it insulates state authority to regulate hazardous wastes from preemption by federal regulatory requirements, so long as the state provisions are not "less stringent than those authorized under [RCRA §§ 3001-3020] respecting the same matter." 42 U.S.C. § 6929, Appendix *infra*, at 2a.

Once a state program is authorized by EPA, the state is required "to carry out such program in lieu of the Federal program." 42 U.S.C. § 6926(b), Appendix *infra*, at 1a. Action taken by a state pursuant to its authorized hazardous waste program carries "the same force and effect as action taken by [EPA] under [RCRA]." *Id.* § 6926(d). A state's authorization continues until EPA determines after a public hearing (initiated on its own or by citizen petition) that the state program no longer conforms to federal requirements. 42 U.S.C. § 6926(e); 40 C.F.R. §§ 271.22-23. See *Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390 (D.C. Cir. 1991). "[A]ny interested person" may seek judicial review in a U.S. Court of Appeals of EPA's grant, denial, or withdrawal of state authorization to operate a hazardous waste program in lieu of the Federal program. RCRA

§ 7006(b), 42 U.S.C. § 6976(b). Absent a timely petition, review is barred.⁷

In implementing RCRA §§ 3006 and 3009, EPA's regulations explicitly address the necessary and thus permissible effects on interstate commerce of an authorized state program.⁸ In particular, 40 C.F.R. § 271.4(a) establishes standards to evaluate whether a state program is "consistent" with federal law within the meaning of RCRA § 3006(b), and one facet of the "consistency" requirement is that a state program may not affect interstate commerce in an "unreasonabl[e]" manner:

Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.

Id., Appendix *infra*, at 3a. EPA adopted this "reasonableness" test in Section 271.4(a) to adjudge the interstate commerce effects of an authorized state program. In doing so, the Agency gave explicit, detailed consideration to the statutory framework and the provisions of RCRA §§ 3006 and 3009 and this Court's interpretations of the "dormant" Commerce Clause. *See* 45 *Fed. Reg.* 33,290, 33,395 (May 19, 1980).⁹

⁷ Thus, review of EPA's action in 1985 in approving South Carolina's program, including South Carolina's differential fee, is no longer available.

⁸ Some aspects of RCRA require reference to the state of origin of hazardous waste; *e.g.*, operation of the "manifest" system, which for safety reasons tracks the transportation of hazardous waste, 40 C.F.R. Part 262, Subpart B. The federal framework must also accommodate "more stringent" treatment, storage and disposal standards implemented by states under Section 3009 of RCRA, 42 U.S.C. § 6929, Appendix *infra*, at 2a.

⁹ EPA followed *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), and deemed any "ban on the interstate movement of hazard-

Thereafter, when in 1985 HWTC raised a Commerce Clause challenge to approval of South Carolina's hazardous waste program, EPA applied the "reasonableness" test of 40 C.F.R. § 271.4(a) to South Carolina's differential fee on hazardous waste disposal. EPA determined that the "unreasonably restricts [or] impedes" phrase in Section 271.4(a) created a "facts and circumstances test." 50 *Fed. Reg.* 46,437, 46,440 (Nov. 8, 1985), Appendix *infra*, at 13a. EPA resolved to "look to all relevant factors" in evaluating a restriction or impediment on the movement of hazardous waste into a state. *Id.* at 46,439, Appendix *infra*, at 11a. The Agency considered the applicability of this Court's decision in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), but concluded that the "Agency is not required to adopt the Constitutional test for impediments or restrictions in interpreting its own regulations, and declines to do so here." 50 *Fed. Reg.* at 46,439, Appendix *infra*, at 11a. Moreover, EPA rejected the contention "that any disparity in treatment between in-State and out-of-State waste is *per se* unreasonable." *Id.* After reviewing "[a]ll available evidence," *id.*, Appendix *infra*, at 12a, EPA sustained the South Carolina differential fee.

EPA's process and procedures under its RCRA regulations for review, approval, and withdrawal of state hazardous waste regulatory programs thus are used to address unreasonable restrictions on interstate waste movements. However, another regulatory program administered by EPA also has a direct bearing on permissi-

ous waste" as "automatically inconsistent." 45 *Fed. Reg.* 33,290, 33,395 (May 19, 1980) (emphasis added). At the same time, EPA did not indicate whether its regulatory language, "unreasonabl[e] restrict[ion] or imped[iment]," would or could be construed to adopt the *City of Philadelphia* test. The evident difference between the language chosen by EPA for the regulation and the explication of the test set out in *City of Philadelphia* indicates that the regulatory criterion was intended by EPA to be interpreted differently from the *City of Philadelphia* test.

ble state programs. The complementary program is that arising under Section 104(c)(9) of CERCLA, 42 U.S.C. § 9604(c)(9). This program requires states to provide assurance that they "have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the [next] 20-year period."

Id. If a state does not provide the requisite assurance, the sanction specified in CERCLA § 104(c)(9) is that "the President shall not provide any remedial actions pursuant to this section" within the state. In other words, federal "Superfund" money for remedial actions within the offending state shall be cut off.¹⁰ As a matter of policy, EPA's Administrator has directed that procedures under RCRA for withdrawing authorization of a state's hazardous waste regulatory program should be pursued only "after determining that the CERCLA process has proven ineffective." Memorandum from Lee M. Thomas to Regional Administrators, "Policy Regarding Hazardous Waste Management Capacity and RCRA Consistency Issues" (Dec. 23, 1988), Appendix *infra*, at 18a. "The CERCLA capacity assurance process should be used as an initial response to State actions which prohibit waste management within State boundaries without environmental justification." *Id.*

The capacity-assurance provision of CERCLA was adopted because EPA and states had failed to permit new

¹⁰ CERCLA § 104(c)(9) was added by Section 104(k) of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (Oct. 17, 1986) (amending scattered sections of CERCLA). The facilities relied upon to make the capacity-assurance showing must be "within the State or outside the State in accordance with an interstate agreement or regional agreement or authority." CERCLA § 104(c)(9)(B), 42 U.S.C. § 9604(c)(9)(B).

South Carolina and other states in the Southeastern Region have entered into a SARA Capacity Assurance Regional Agreement, *see supra*, pp. 2-3 & n.3, to coordinate efforts in assuring the requisite capacity for disposing of hazardous wastes.

commercial hazardous waste disposal facilities following implementation of RCRA. This failure had caused the few states with pre-RCRA facilities (including Alabama and South Carolina) to bear a vastly disproportionate share of the Nation's hazardous waste burden.¹¹ In re-

¹¹ The burden extends well beyond the commitment of land resources for hazardous waste landfills and other disposal or treatment facilities. (Land used as a hazardous waste landfill ordinarily is prevented from being used in the future for a full range of purposes.) The risk of releases from landfills is very real, notwithstanding the existence of regulatory standards and requirements for their design and operation. Landfilling as a disposal method is disfavored precisely because it cannot assure long-term containment. *See* RCRA § 1002(b)(7) and (8), 42 U.S.C. § 6901(b)(7) and (8), quoted *infra*, pp. 17-18 n.18; Brief for the Respondents, p. 5, quoting General Accounting Office, *Hazardous Waste, Funding Of Post-closure Liabilities Remains Uncertain* (June 1990), J.A. 84. And, permitted facilities have been known not to comply with permit conditions and terms. For example, in South Carolina, the one hazardous waste landfill is located near Pinewood in Sumter County. That facility operates under "interim status"; its issued permit has been appealed and is not yet effective. *See infra*, p. 16 n.16. Since 1985, when EPA approved South Carolina's hazardous waste management program, the State has issued eight separate enforcement orders respecting the Pinewood landfill, as follows: *In Re: GSX Services of South Carolina, Inc.*, Administrative Consent Order No. 86-37-SW (July 1, 1986) (expanded groundwater assessment program to assess contaminants identified in groundwater); Administrative Consent Order No. 86-47-SW (Sept. 5, 1986) (civil penalty of \$1,500 and schedule for submission of information necessary for permit application); Amendment to Administrative Consent Order No. 86-37-SW (June 29, 1987) (additional sampling activities and initial corrective action); Administrative Consent Order No. 88-03-SW (Jan. 27, 1988) (civil penalty of \$1,000 and schedule for submission of information necessary for permit application); Administrative Consent Order No. 89-15-SW (June 15, 1989) (civil penalty of \$4,000 and specifications for sampling and analysis plan); Administrative Consent Order No. 90-80-SW (Nov. 26, 1990) (civil penalty of \$1,100 and specifications concerning satellite container waste and spill clean-up waste); Administrative Order No. 91-44-SW (July 11, 1991) (civil penalty of \$64,590 and requirements related to leaks in tanks and failure promptly to remove liquid in secondary contain-

porting the legislation that became SARA, the Senate Committee on Environment and Public Works stated that:

ment system); Administrative Consent Order No. 91-66-SW (Nov. 13, 1991) (civil penalty of \$135,000, requirements for timely removal of material in secondary containment system, repair of berms for landfill cells, and repair of liners to cells).

Moreover, transportation of hazardous wastes has proven to be troublesome. For example, on July 23, 1991, a truck carrying toxic wastes on I-95 just south of Washington, D.C. caught fire by spontaneous combustion of the wastes. *See Heat Ignites Truck's Toxic Waste Paralyzing I-95 in Va.*, Washington Post, July 24, 1991, at A1. The truck burned for several hours before firefighters approached the vehicle because they feared that barrels in the truck could explode. *Id.* Press reports stated that "the road situation became increasingly desperate":

Fire officials blocked off all lanes on I-95

Some cars were diverted to Route 1, the only other major north-south road in the area. Then, from 1 to 2 p.m., Route 1 was also closed when some motorists there complained of burning eyes

The congestion spread throughout the two-lane rural roads that service the area.

. . .

Virginia State Police Sgt. Dean Jones said motorists in 18 cars and passengers in three buses were escorted off the highway because of health problems, including one man who suffered a heart attack near the Beltway and I-95. Fairfax Fire Department spokeswoman Pam Weiger said her agency treated six people on the highway for heat exhaustion and evacuated three others to area hospitals.

Id. at A6.

Other accidents involving trucks carrying hazardous wastes have created similar harms and inconvenience to motorists and nearby residents. *See Crash on I-270 Forces Evacuations in Rockville; Officials Fear Leak of Explosive Cargo*, Washington Post, Dec. 15, 1989, at A1 ("tractor-trailer carrying 14 tons of hazardous chemicals . . . overturned on Interstate 270 in Rockville at rush hour last night, forcing the evacuation of at least 100 houses near the highway").

The record in the instant case includes evidence of accidents involving trucks carrying hazardous waste to the Emelle facility. J.A. 38-39.

Superfund money should not be spent in States that are taking insufficient steps to avoid the creation of future Superfund sites. . . .

. . .

While everyone wants hazardous waste managed safely, hardly anyone wishes it managed near them. This is the NIMBY syndrome (not in my backyard). Yet, if the RCRA and Superfund programs are to work—if public health and the environment are to be protected—the necessary sites must be made available.

S. Rep. No. 11, 99th Cong., 1st Sess., 22-23 (1985). *See also* 132 Cong. Rec. S14,924-25 (Oct. 3, 1986) (statement of Sen. Chafee); 131 Cong. Rec. S11,584-85 (Sept. 17, 1985) (statement of Sen. Chafee); H. Rep. No. 253 (I), 99th Cong., 1st Sess., at 130-31 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 2835, 2912-13. Congress' goals in adopting CERCLA § 104(c)(9) were summarized as: "obtaining an [sic] good national picture of hazardous waste management, ensuring that states would develop the capacity needed to manage future waste, and discouraging states from relying on out-of-state disposal capacity in lieu of solving local siting barriers."¹² By requiring each state to account for its own hazardous waste and to provide for its disposition within its borders, Congress intended that new disposal capacity would be created, and it understood that states would also distinguish (as Congress had) between hazardous waste generated in-state and that generated out-of-state.

The CERCLA capacity-assurance provision has not had the desired effect. Since its enactment, and indeed for more than the past decade, only one new commercial hazardous waste landfill has been permitted under RCRA

¹² National Governors' Association, Natural Resources Policy Studies, Center for Policy Research, *Hazardous Waste Management In The States: A Review Of The Capacity Assurance Process*, at 20 (March 1992 draft) [hereafter "NGA Capacity Assurance Study"].

and become operational anywhere in the Nation. See *supra*, p. 3 & n. 6. Nothing has been accomplished as a result of the federal regime in RCRA and CERCLA to produce the desired proportionality of burden.¹³ Moreover, EPA has not acted under either the CERCLA capacity-assurance provision or under RCRA's consistency provision to apply sanctions to states that have refused to create new disposal capacity by siting new facilities. EPA's default has reinforced other states' reliance on the few existing facilities in states like Alabama and South Carolina. See, e.g., *Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390 (D.C. Cir. 1991); *South Carolina ex rel. Medlock v. Reilly*, No. 91-3090 NHJ (D.D.C.

¹³ The *NGA Capacity Assurance Study* compiled data on net imports and exports of hazardous waste in 1987, based on state capacity assurance plans submitted in 1989. The Study reported that 35 states were net exporters of hazardous waste and that

the top five waste exporting states are Pennsylvania (158,677 tons), California (119,978 tons), Washington (108,491 tons), Michigan (76,295 tons), and Massachusetts (71,109 tons). In general, the amount of net waste exports are rather small compared to the total amount of waste generated by each state. Of the top five exporters, only Washington and Massachusetts had export figures that exceeded 30 percent of their generation (these states exported the equivalent of 33 and 46 percent, respectively of their generated waste

In contrast, the net waste importers tend to report net transactions on a more significant scale. The top five net importing states are Indiana (251,478 tons), Louisiana (230,300 tons), Alabama (199,859 tons), Ohio (183,005 tons), and South Carolina (108,985 tons). It is interesting to note that the top net importing states receive almost twice as much waste as that which leaves the top five exporting states.

NGA Capacity Assurance Study, *supra* n.10, at 13-14.

In the ensuing several years, waste minimization efforts may have modestly reduced the overall quantity of hazardous wastes shipped but the proportions sent to and from the several states, especially to landfills, have remained relatively constant because new hazardous waste landfill capacity has not been added. See Brief for the Respondents, p. 2 & n.1.

filed Dec. 2, 1991); *New York v. Reilly*, No. 91-CV-1418 (N.D.N.Y. filed Dec. 16, 1991).

On December 8, 1987, Alabama's hazardous waste program was approved under RCRA to operate in lieu of the federal program. Following Alabama's adoption of the differential fee at issue in this case, neither EPA nor CWM invoked RCRA's regulatory process to challenge the fee as being an unreasonable impediment to interstate commerce and therefore inconsistent with and violative of RCRA within the meaning of 40 C.F.R. § 271.4 (a). Instead, CWM brought suit in state court to contest the constitutionality of the provision. On appeal from a decision after a four-day non-jury trial, the Alabama Supreme Court held that Alabama had advanced sufficient justification for its laws to withstand the elevated-scrutiny test set out in *Maine v. Taylor*, 477 U.S. 131 (1986). This Court granted certiorari to address the permissibility of the differential fee under the Commerce Clause.¹⁴

SUMMARY OF ARGUMENT

Alabama's differential fee for disposal at permitted landfills within the State of hazardous waste generated outside the State serves Alabama's legitimate purposes that could not be served by alternatives. The landfill disposal within Alabama of large amounts of hazardous wastes generated elsewhere, and the associated transportation of such wastes, imposes excessive environmental burdens and costs on the State and its citizenry. These

¹⁴ Petitioner CWM unsuccessfully challenged other aspects of Ala. Act No. 90-326 (codified at Ala. Code §§ 22-30B-1.1 *et seq.*) under the Commerce Clause. Act No. 90-326 also imposed a base disposal fee of \$25.60 per ton on all hazardous waste disposed of at Alabama's commercial disposal facilities and placed a statutory cap on the amount of hazardous waste that could be disposed of at such facilities over a one-year period. The trial court ruled that the base fee and statutory cap did not violate the Commerce Clause, and that decision was upheld by the Alabama Supreme Court. See *Hunt v. Chemical Waste Management, Inc.*, 584 So.2d 1367 (1991), Appendix to Petition, p. 1a.

burdens and costs are in part offset by the differential fee.

The cause of the excessive landfill waste disposal burden and costs placed on Alabama is readily discernable. Since enactment of RCRA, there has been a general nationwide failure to site new commercial landfill capacity for disposal of hazardous waste. The paucity of new or additional capacity in large part stems from EPA's failure to implement its pertinent authority under RCRA and CERCLA and from many states' purposeful efforts to saddle neighboring states with their hazardous waste disposal. The resulting scarcity has placed insupportable burdens on states like Alabama and South Carolina which have the few permitted landfill facilities. The Alabama Supreme Court was correct to determine that, even when subjected to elevated scrutiny under the "dormant" Commerce Clause, Alabama's justifications based upon health, safety, and welfare provide ample support for its hazardous waste laws and, specifically, for the state's differential fee on hazardous waste disposal.

This case turns on the detailed framework in RCRA for adoption and approval of state hazardous waste regulatory programs, including differential fees, approval by EPA of those programs, and implementation of them "in lieu" of the federal program once EPA has given its approval. This RCRA framework, taken with the complementary capacity-assurance provisions in CERCLA § 104 (c) (9), 42 U.S.C. § 9604 (c) (9), displaces dormant Commerce Clause principles. EPA has adopted a regulatory test, set out at 40 C.F.R. § 271.4, which makes "inconsistent," and thus not approvable, a state "program which unreasonably restricts, impedes, or operates as a ban on the free movement . . . of hazardous wastes." Appendix *infra*, at 3a. Because the Alabama fee differential is reasonable in the circumstances, it should be sustained upon application of that test, whether by EPA or a court.

ARGUMENT

THE ALABAMA SUPREME COURT CORRECTLY ACCORDED SIGNIFICANT WEIGHT TO ALABAMA'S LEGITIMATE PUBLIC PURPOSES IN ADDRESSING THE DISPOSAL OF HAZARDOUS WASTE WITHIN ITS BORDERS

A. The Federal Regulatory Program Has Failed To Relieve States Like Alabama And South Carolina Of An Insupportable Burden Placed On Them By The Numerous States Which Have Failed To Site Any Landfill Facilities For Hazardous Wastes

A major challenge in dealing with hazardous wastes today, according to the National Governors' Association's current study, is to

create incentives that discourage the generation of hazardous wastes, encourage the development of in-state or regional management capacity, and compensate importing states for the significant costs, risks, and other burdens they bear as hosts to hazardous waste management facilities used by other states.

NGA Capacity Assurance Study, supra n.10, at D-1 (Excerpt from NGA Policy Position on Hazardous Waste Management, as of March 22, 1992). For Alabama and South Carolina, the legislative efforts to address this challenge — embodied in RCRA and CERCLA — have failed. The federal RCRA and CERCLA programs have had the ironic and unintended consequence of forcing a few states with operable hazardous waste landfill facilities to make up for the failure of other states to permit disposal within their borders.¹⁵ Alabama and South Car-

¹⁵ The article of commerce at issue in this case is not the hazardous waste itself, which by definition has no value or more probably a negative value. See RCRA § 1004 (27), 42 U.S.C. § 6903 (27), defining "solid waste," of which hazardous waste is a subset, to mean "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material . . ." (Emphasis added.) See also 40 C.F.R. § 261.2 (definition of "solid waste" in EPA's regulations). In

olina, which had hazardous waste landfill disposal facilities in place before the advent of RCRA, have suffered the brunt of other states' lack of political resolve to site new landfill disposal capacity. See S. Rep. No. 11, 99th Cong., 1st Sess., at 22-23 (1985) (quoted *supra*, p. 11). The few states with existing hazardous waste landfill disposal capacity thus have shouldered a wholly disproportionate share of the hazardous waste disposal burden.¹⁶ Rather than promoting the development of a unified, coherent, nationwide response to this country's hazardous waste disposal problem, the federal regime instead has institutionalized the NIMBY (not in my backyard) syndrome and penalized those states with existing facilities. Under these circumstances, Alabama was justified in modifying its federally-authorized program to regulate more stringently the in-state disposal of hazardous waste

American Mining Congress v. EPA, 824 F.2d 1177 (D.C. Cir. 1987), the court of appeals ruled that EPA's definition of solid waste contravened the statutory definition insofar as "in-process secondary materials" were concerned. *Id.* at 1192-93. As the court put it, Congress intended that "'solid waste' (and therefore EPA's regulatory authority) be limited to materials that are 'discarded' by virtue of being disposed of, abandoned, or thrown away." *Id.* at 1193 (footnote omitted).

The item traded in commerce actually is the landfill disposal capacity for hazardous wastes. Landfill capacity does not move in interstate transactions, but commercial transactions attend the interstate movement of hazardous wastes for ultimate landfill disposal.

¹⁶ Before 1980, the treatment, storage, and disposal of hazardous waste was largely unregulated. Disposal facilities in place before 1980, when RCRA regulations first took effect, were allowed to operate under "interim status" until a final RCRA permit was obtained under the federal rules or their state analog. RCRA § 3005(e), 42 U.S.C. § 6925(e); see 40 C.F.R. Part 265 (EPA regulations governing "interim status" facilities). As noted by EPA, pre-RCRA facilities "are allowed to operate under certain less stringent conditions and regulations on an interim basis until final permit determinations are made." EPA Office of Solid Waste & Emergency Response, *The Nation's Hazardous Waste Management Program at a Crossroads—The RCRA Implementation Study*, at 41 (July 1990).

and thereby better protect the safety, health, and welfare of its residents and the state's environment.

The current study of state hazardous waste import-export activity performed by the National Governors' Association ("NGA") illuminates the severe imbalance among states.¹⁷ The NGA study shows that Alabama is one of the largest net importers of hazardous waste in the entire nation, annually taking nearly half a *billion* pounds of hazardous waste per year from other states. *NGA Capacity Assurance Study*, *supra* n.10, at 14. Also on a net basis, Louisiana annually receives a comparable amount of hazardous waste. *Id.* Similarly, South Carolina holds the dubious distinction of being the fifth largest net importer of hazardous waste, managing nearly a quarter of a *billion* pounds of other states' hazardous waste per year. *Id.*

Contrary to the impression created by the Brief for the United States as *Amicus Curiae* at 5, there are only 20 operational RCRA-permitted commercial landfill facilities for hazardous waste, *nationwide*, located in 15 states. See Testimony of P. Payne, president of Chemical Waste Management, before the National Governors' Association Committee on Energy and Environment, February 2, 1992, *reported in* BNA Daily Environment Report, February 4, 1992, at A-6 to A-7. Over the last 10 years, only one new commercial landfill facility has been permitted and become operational for hazardous waste. See *supra*, p. 3 & n.6. Because only 15 states possess any commercial landfill capacity for hazardous wastes, most of the nation has exported, and continues to export, hazardous waste for landfilling in other states.¹⁸ The fate

¹⁷ *NGA Capacity Assurance Study*, *supra* n.10, at 11-14 (partially quoted, *supra*, p. 12 n.13).

¹⁸ Alabama's effort to regulate the flow of hazardous waste into the Emelle facility is entirely consonant with Congressional goals of decreased reliance on landfill disposal:

The Congress finds with respect to the environment and health, that—

of Alabama, South Carolina, and their companion states reflects the irony of a failed regulatory regime: *solely* because these states had sited landfill capacity for hazardous wastes *prior* to implementation of the RCRA regulations, they are being asked by Petitioner and others to bear the brunt of the entire hazardous waste landfill disposal burden on a long-term basis.

The capacity-assurance requirement of CERCLA § 104(c)(9) has afforded no relief to South Carolina and Alabama, contrary to Congress's intent. Congress expected that this CERCLA mandate would remedy the inequities posed by certain states' unwillingness to confront the NIMBY syndrome. In addressing the Conference Report of the CERCLA amendments to the Senate on October 3, 1986, Senator Chafee was explicit:

This is not a new issue. In 1976, RCRA directed the States to develop plans for the management of *their* wastes, including hazardous wastes. . . .

Section 104 of Superfund already requires that each State assure the availability of a RCRA-approved facility for management of materials removed from a site before remedial action can begin. Unfortunately, that condition has been largely ignored by EPA and the States.

...

(7) certain classes of land disposal facilities are not capable of assuring long-term containment of certain hazardous wastes, and to avoid substantial risk to human health and the environment, reliance on land disposal should be minimized or eliminated, and land disposal, particularly landfill and surface impoundment, should be the least favored method for managing hazardous wastes; and

(8) alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable solid waste disposal sites within five years unless immediate action is taken.

RCRA § 1002(b)(7) and (8), 42 U.S.C. § 6901(b)(7) and (8).

Many states have enacted, or have pending some form of siting legislation. . . . Merely having enacted such legislation, however, will not satisfy the requirement of this section [104(c)(9)]. Each State must provide assurances that their legislative program can work and will be used.

132 Cong. Rec. S14,924-25 (daily ed. Oct. 3, 1986) (emphasis added).

By requiring in Section 104(c)(9) that each state assure that it will have adequate capacity to dispose of hazardous waste generated *in that state*, additional facilities with new capacity would be sited notwithstanding the NIMBY syndrome. *Id.*¹⁰

Unfortunately, enactment of CERCLA § 104(c)(9) and implementation of the capacity-assurance requirement has not produced the desired result. EPA has fail-

¹⁰ Congress understood that importing states could refuse the exporting state access to its facilities for purposes of meeting the Section 104(c)(9) requirement. To qualify for Superfund assistance, the exporting state would have the incentive to create new capacity. EPA anticipated and endorsed this approach in CERCLA guidance to the states:

Congress required exporting states to provide assurances and to obtain interstate agreements, because political pressures encourage states to export their wastes to other states rather than to create available capacity By requiring (as a condition for remedial actions) agreements between states regarding future access to available interstate capacity, Congress counterbalanced these political pressures in exporting states with the political pressures in importing states that might oppose continued receipt of such exports. *An importing state might refuse to enter into an agreement with an exporting state, requiring the exporting state to create available capacity through waste reduction or through siting new facilities, or to enter into an agreement with other importing state to manage these wastes.*

Assurance of Hazardous Waste Capacity: Guidance to State Officials, OSWER Directive No. 9471.00-01, at 3 (formerly No. 9010.00 (Dec. 1988) (emphasis added), supplemented by OSWER Directive No. 9471.00-02 (formerly 9010.00a (Oct. 1989)) and OSWER Directive No. 9471.00-01a (Apr. 15, 1991).

ed to use its powers under CERCLA or RCRA to require that states permit additional disposal capacity. Indeed, if the Agency's position articulated in this and other recent litigation were to be accepted, it would lead to the stunning conclusion that states may effectively ban all hazardous waste disposal in-state for "NIMBY" reasons; such an effective ban would mandate reliance on exports to South Carolina, Alabama, and other states with existing, pre-RCRA capacity. See *Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390 (D.C. Cir. 1991). On the other hand, the Agency's litigation positions correlative would bar states like South Carolina, which have permitted facilities, from implementing their capacity-assurance plans, even though South Carolina has expressly reserved more capacity for disposal of out-of-state waste than for locally-generated waste at these permitted facilities. See *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781 (4th Cir. 1991). Surely this posture on the part of EPA is neither what Congress provided in enacting RCRA §§ 3006 and 3009 and CERCLA § 104(c)(9), nor what the "dormant" Commerce Clause commands.

B. Measured By A "Dormant" Commerce Clause Analysis Or Statutory Criteria, Alabama's Differential Fee Is Tailored To Serve A Legitimate Public Purpose

The analytical framework for this case is in dispute. The Alabama Supreme Court applied a "dormant" Commerce Clause test derived from *Maine v. Taylor*, 477 U.S. 131 (1986), focusing on whether a state statute "serves legitimate local purposes that could not adequately be served by available non-discriminatory alternatives." Appendix to Petition, at 43a, citing *Maine v. Taylor*, 477 U.S. at 151-52. The briefs of Petitioner and supporting amici emphasize and urge an analysis based upon the "strictest scrutiny" of economic protectionist measures. This case is not about economic protection, however. Alabama is not seeking to "protect" its hazardous waste landfill industry. And, as the brief for the

United States, as *amicus curiae* points out, this case arises in a setting shaped almost entirely by the federal regulatory regime established by RCRA and CERCLA. Federal law plays such a large role that this should not be a "dormant" Commerce Clause case at all. See *infra*, p. 23.

In all events, strikingly absent from the briefs of the Petitioner and supporting amici, including that of the United States, is any reference to or recognition of the central role played by the states in the regulation of hazardous wastes. While RCRA provides a very detailed federal regulatory scheme, Congress did not displace state authority. It rather provided for integration of state authority within the federal framework, which provides a regulatory floor for state action. The prominent role given to state authority must be afforded significant weight in any Commerce Clause analysis.

Congress has expressly provided that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional and local agencies." RCRA § 1002(a)(4), 42 U.S.C. § 6901(a)(4). Section 3006(b) of RCRA provides that authorized state hazardous waste management programs operate "in lieu of the Federal program." 42 U.S.C. § 6926(b), Appendix *infra*, at 1a. In addition, RCRA § 3009 preserves state authority against preemption by federal regulatory requirements where the state provisions are not "less stringent than those authorized under [RCRA §§ 3001-3026] respecting the same matter." *Id.* § 6929, Appendix *infra*, at 2a.

Congress went further, moreover, and in RCRA § 3009, it preserved for the states the authority to regulate hazardous waste with provisions "which are more stringent than those imposed by" federal law. *Id.* (captioned "Retention of State Authority"). The House Report of the bill that became RCRA identified this section as "the key to the development and implementation of the hazardous waste title." H.R. Rep. No. 1491, 94th

Cong., 2d Sess., at 31, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6238, 6269. In that regard, the House Committee Report observed that "federal preemption of this problem is undesirable, inefficient, and damaging to local initiative." *Id.* at 33, 1976 U.S. Code. Cong. & Admin. News at 6271. In testimony before Congress preceding RCRA's enactment, EPA endorsed RCRA's "emphasis on State primacy in terms of hazardous waste regulatory program operations. We also believe that strong State regulatory programs are the most effective way to assure appropriate management of hazardous wastes."²⁰

EPA has construed Sections 3006 and 3009 to provide congressional authorization for the states to differentiate in their treatment of in-state versus out-of-state waste, and did so specifically when considering South Carolina's differential fee under 40 C.F.R. § 271.4(a):

More stringent requirements are expressly permitted by RCRA Section 3009. These requirements may have some adverse effect on interstate commerce. Different requirements are permissible if they are not inconsistent with the Federal program and approved State programs. Authorized States have adopted many State requirements that are unlike the requirements of other States and which, in some cases, have an effect on the flow of wastes. The Agency does not believe that the mere existence of differences or disparities in treatment makes State programs inconsistent *per se*. Congress expected that States would not have identical programs and recognized the importance of allowing States to experiment with different requirements. Congress gave EPA the authority to interpret the term "consistent";

²⁰ *Resource Recovery and Conservation Act of 1976: Hearings on H.R. 14496 Before the Subcomm. on Transportation and Commerce of the Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess. 97-98 (1976) (Statement of Sheldon Meyers, Deputy Assistant Administrator for Solid Waste Management Programs, Environmental Protection Agency).*

the Agency has interpreted the term in § 271.4 to prevent *unreasonable* restrictions or impediments in authorized programs.

50 *Fed. Reg.* at 46,439, Appendix *infra*, at 11a-12a (emphasis added).

EPA's analysis of differential fees in the South Carolina program-approval proceeding has two consequences for this case. First, it shows that the "reasonableness" test adopted by EPA in 40 C.F.R. § 271.4(a), and not "dormant" Commerce Clause jurisprudence, should control. Compare *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 174 (1985); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 421-27 (1946); with *Wyoming v. Oklahoma*, —U.S.—, 112 S. Ct. 789, 802 (1992); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 90-91 (1984); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340-43 (1982).²¹ But regardless of whether § 271.4(a)

²¹ The Alabama differential fee was adopted after EPA granted final approval to the Alabama hazardous waste program, but that does not derogate from the validity of the provision under RCRA or subject it to "dormant" Commerce Clause scrutiny rather than 40 C.F.R. § 271.4(a). The federal-state RCRA alliance is a dynamic venture; an approved state program is not static. Changes to an authorized program do not require express EPA authorization to become effective, and all statutory or regulatory modifications or supplements to the program operate "in lieu of the Federal program," 42 U.S.C. § 6926(b), Appendix *infra*, at 1a, unless and until EPA authorization is withdrawn through administrative procedures. *Id.* § 6926(e); 40 C.F.R. §§ 271.22-23. No such proceedings were initiated by CWM prior to raising its challenge in the Alabama state courts. If CWM had raised its claims before EPA, an ensuing decision by EPA would have been reviewable in a federal court of appeals. RCRA § 7006(b), 42 U.S.C. § 6976(b). Petitioner's choice of forum should not alter the controlling law.

Particularly where EPA has already addressed the validity of a differential fee in light of RCRA §§ 3006(b) and 3009 and of EPA's own regulations, as it has in the case of South Carolina's, Maine's,

is thought to be controlling, EPA's analysis of RCRA Sections 3006(b) and 3009 evidences that states may differentiate between in-state waste and out-of-state waste. Therefore, petitioner's and supporting amici's contention that the Alabama fee is unconstitutional simply because it "discriminates" between in-state and out-of-state waste is wrong. Dogmatic and repetitive references to language from *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), are quite beside the point given the circumstances pertinent to this case.

The second implication evident from EPA's analysis in the South Carolina program-approval proceeding is that hazardous waste, or, more properly, hazardous waste landfill capacity, as an article of commerce operates in a milieu governed by detailed regulation. This circumstance is by congressional design:

- Congress authorized states to regulate hazardous waste more stringently than federal law does, explicitly to serve environmental purposes. RCRA § 3009, 42 U.S.C. § 6929, Appendix *infra*, at 2a.
- Congress declared that "reliance on land disposal should be minimized or eliminated, and land dis-

and Ohio's differential fees, that prior construction is entitled to great weight. "[T]he court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984) (footnotes omitted).

The *amicus* brief filed by the United States on behalf of EPA may not revise or alter EPA's interpretation expressed in regulations and policy decisions. "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." *Investment Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971). EPA itself has noted that its Office of General Counsel and other "entities within EPA do not appear to share a common focus regarding the RCRA program's goals and priorities," as a result of which "the regions and states . . . pay the price for this lack of integration." EPA Office of Solid Waste & Emergency Response, *The Nation's Hazardous Waste Management Program at a Crossroads—The RCRA Implementation Study*, at 16-17 (July 1990).

posal, particularly landfill [such as at Petitioner's Emelle facility] and surface impoundment, *should be the least favored method for managing hazardous wastes*" because such facilities "are not capable of assuring long-term containment of certain hazardous wastes, and to avoid substantial risk to human wealth and the environment." RCRA § 1002(b) (7), 42 U.S.C. § 6901(b) (7) (emphasis added).

- Congress understood that the failure to site and permit new disposal facilities is not a market failure but a regulatory result of the NIMBY syndrome, and Congress's remedy was not to unleash market forces but to require each state to assure adequate capacity for disposal of *its* waste, which it must do by demonstrating the availability of facilities that are "*within the State or outside the State in accordance with an interstate agreement or regional agreement or authority.*" CERCLA § 104(c) (9) (B), 42 U.S.C. § 9604(c) (9) (B) (emphasis added).

The issue in this case thus is *not* whether the Alabama statute will interfere with the market or lead to "Balkanization." In this particular area, fundamental market principles were long ago bent far from their normal shape by regulation. From the perspective of Alabama and South Carolina, the Balkanization which has occurred relates to burdens and has been escalated by EPA's tacit acceptance of the NIMBY syndrome. The issue is whether Alabama has acted reasonably under the circumstances (40 C.F.R. § 271.4(a)), or whether, as elucidated in *Maine v. Taylor*, 477 U.S. 131 (1986), the State's action is "justified by a valid factor unrelated to economic protectionism." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274 (1987) (citing *Maine v. Taylor*).

The Alabama Supreme Court demonstrated articulately that the fee differential can withstand the elevated scru-

tiny of the test set out in *Maine v. Taylor*. The environmental concerns motivating the legislation are substantial. Given the failure of the existing regulatory regime to site new post-RCRA landfill capacity for hazardous wastes, and the failure of the CERCLA capacity-assurance program to work a change in this situation, waste imports can and do impose disparate burdens on states which have existing landfill capacity. See, e.g., *National Solid Wastes Management Association v. Voinovich*, No. 91-3466 (6th Cir. March 4, 1992) (1992 U.S. App. LEXIS 3500). Moreover, the State has "a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may prove ultimately to be negligible." *Maine v. Taylor*, 477 U.S. at 148.²²

Landfilling of hazardous waste at the Emelle facility in Alabama poses a serious threat, one which extends well beyond the eventual closure of that facility. RCRA has failed the State; CERCLA has failed the State; EPA has failed the State. Under federal law, it is manifestly appropriate for Alabama to exercise its authority under federal statute to regulate the treatment, storage, and disposal of hazardous waste within its borders. Alabama's differential fee on hazardous waste represents a measured exercise of the state's traditional police powers, narrowly crafted to recompense special burdens Alabama bears for hazardous waste landfill disposal at minimal cost to the national economic union. Whether measured by 40 C.F.R. § 271.4(a) or *Maine v. Taylor*, the fee differential should be sustained.

²² In this instance, the risks are all too real, even though they may be difficult to quantify. What is the cost, for example, of stranding thousands of motorists in a huge traffic jam caused by the spontaneous combustion of a truckload of hazardous waste? See *supra*, pp. 9-10 n.11.

CONCLUSION

For the reasons set forth above, and those set forth in the Brief for the Respondents, the judgment of the Alabama Supreme Court should be affirmed.

Respectfully submitted,

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April 9, 1992

APPENDIX

APPENDIX

RCRA Section 3006(b), 42 U.S.C. § 6026(b):

§ 6926. Authorized State hazardous waste programs

* * *

(b) Authorization of State program

Any State which seeks to administer and enforce a hazardous waste program pursuant to this subchapter may develop and, after notice and opportunity for public hearing, submit to the Administrator an application, in such form as he shall require, for authorization of such program. Within ninety days following submission of an application under this subsection, the Administrator shall issue a notice as to whether or not he expects such program to be authorized, and within ninety days following such notice (and after opportunity for public hearing) he shall publish his findings as to whether or not the conditions listed in items (1), (2), and (3) below have been met. Such State is authorized to carry out such program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste (and to enforce permits deemed to have been issued under section 6935(d)(1)¹³ of this title) unless, within ninety days following submission of the application the Administrator notifies such State that such program may not be authorized and, within ninety days following such notice and after opportunity for public hearing, he finds that (1) such State program is not equivalent to the Federal program under this subchapter, (2) such program is not consistent with the Federal or State programs applicable in other States, or (3) such program does not provide adequate enforcement of compliance with the requirements of this subchapter.

In authorizing a State program, the Administrator may base his findings on the Federal program in effect one year prior to submission of a State's application or in effect on January 26, 1983, whichever is later.

RCRA Section 3009, 42 U.S.C. § 6929:

§ 6929. Retention of State authority

Upon the effective date of regulations under this subchapter no State or political subdivision may impose any requirements less stringent than those authorized under this subchapter respecting the same matter as governed by such regulations, except that if application of a regulation with respect to any matter under this subchapter is postponed or enjoined by the action of any court, no State or political subdivision shall be prohibited from acting with respect to the same aspect of such matter until such time as such regulation takes effect. Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations. Nothing in this chapter (or any regulation adopted under this chapter) shall be construed to prohibit any State from requiring that the State be provided with a copy of each manifest used in connection with hazardous waste which is generated within that State or transported to a treatment, storage, or disposal facility within that State.

40 C.F.R. § 271.4:

§ 271.4 Consistency.

To obtain approval, a State program must be consistent with the Federal program and State programs applicable in other States and in particular must comply with the provisions below. For purposes of

this section the phrase "State programs applicable in other States" refers only to those State hazardous waste programs which have received final authorization under this part.

(a) Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.

(b) Any aspect of State law or of the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State may be deemed inconsistent.

(c) If the State manifest system does not meet the requirements of this part, the State program shall be deemed inconsistent.

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Rules and Regulations

[46437]

40 CFR Part 271

[OSW-FRL-2921-6]

South Carolina; Decision on Final Authorization of State Hazardous Waste Management Program

AGENCY: Environmental Protection Agency.

ACTION: Notice of Final Determination on South Carolina's Application for Final Authorization.

SUMMARY: South Carolina has applied for Final Authorization under the Resource Conservation and Recovery Act (RCRA). EPA has reviewed South Carolina's application and has reached a final determination that South Carolina's Hazardous Waste Program satisfies all of the requirements necessary for Final Authorization. Thus, EPA is granting Final Authorization to the State to operate its program in lieu of the Federal program.

EFFECTIVE DATE: Final Authorization for South Carolina, for purposes of judicial review, shall be effective at 1:00 p.m. Eastern time on November 22, 1985. However, in accordance with § 271.20(e), this Notice constitutes the Agency's official decision to approve South Carolina for Final Authorization.

FOR FURTHER INFORMATION CONTACT: Otis Johnson Jr., Chief, Waste Planning Section, Residuals Management Branch, Waste Management Division, U.S. Environmental Protection Agency, 345 Courtland Street N.E., Atlanta, Georgia 30365, (404) 257-3016.

SUPPLEMENTARY INFORMATION:

I. Background

Section 3006 of the Resource Conservation and Recovery Act (RCRA) allows the Environmental Protection Agency (EPA) to authorize State hazardous waste management programs to operate in the State in lieu of the Federal program. To qualify for Final Authorization, a State's program must: (1) Be "equivalent" to the Federal program, (2) be consistent with the Federal program and other State programs, and (3) provide for adequate enforcement (Section 3006(b) of RCRA, 42 U.S.C. 6226(b) [sic]). On July 23, 1984, South Carolina submitted a complete application to obtain Final Authorization to administer a RCRA program. On October 25, 1984, EPA published a tentative decision announcing its intent to grant South Carolina Final Authorization. Further background on the tentative decision appears at 49 FR 42959, October 25, 1984.

In the October 25 notice announcing the Agency's tentative determination, EPA announced the availability of the State's application for public review and comment and the date of a public hearing on the application. The public hearing was not held, since neither EPA nor the South Carolina Department of Health and Environmental Control received a significant show of interest in holding the hearing.

On March 5, 1985, the decision to grant final authorization to South Carolina was temporarily postponed. At that time, EPA decided to defer a final decision until July 1985 to allow the State a reasonable period of time to resolve identified issues.

Prior to EPA's review of the State's performance in July 1985, the South Carolina Hazardous Waste Management Act (1935 Act No. 436) was amended to establish increased fees for disposal of hazardous waste. The amendments passed in June 1985 changed section 44-56-

170 to raise the fee for land disposal of wastes generated within the State from \$5.00 to \$13.00 per ton. For land disposal of wastes generated outside the State, the fee was raised from \$7.50 per ton to either \$18.00 per ton or to the amount that would be charged for land disposal by the State in which the wastes were generated, whichever is higher.

[46438] EPA determined that this statutory change constituted a substantial program revision, and in accordance with 40 CFR 271.20(b), the Agency decided to solicit public comment. On September 13, 1985 (50 FR 37385), EPA published a second notice of tentative determination to approve the State. In that notice, EPA highlighted the question of whether the South Carolina Hazardous Waste Management Act Amendments rendered the State program inconsistent with the Federal program or approved State programs under RCRA.

The question to be settled before EPA granted final authorization was whether the South Carolina fee schedule rendered the State program inconsistent with the Federal program and other State programs. Under § 271.4(a) a State treatment, storage or disposal at facilities authorized to operate under the Federal or an approved State program . . .". [sic]

In the notice of tentative determination, EPA stated that while higher fees for out-of-State wastes should not be encouraged, the Agency did not have any evidence to indicate that the new fees would unreasonably restrict, impede, or operate as a ban on the transportation of hazardous waste into the State. The only evidence before the Agency at that time were South Carolina's statements that the fee imposed constitutes a "relatively small percentage" of the actual cost of disposal and that, in the State's view, it would not unreasonably restrict or impede the movement of hazardous waste (50 FR 37386, September 13, 1985). The Agency solicited comment on whether the State law unreasonably restricts, impedes or

operates as a ban on the importation of hazardous waste, under the consistency requirements of 40 CFR 271.4(a). EPA received written comments and also held a public hearing in Columbia, South Carolina.

II. Basis for EPA's Decision to Grant Final Authorization

The Agency today is making a final determination that the South Carolina fee schedule does not impose an unreasonable impediment or restriction or operate as a ban on the free movement of hazardous waste under 40 CFR 271.4. The fee schedule is not inconsistent with the Federal program or approved State programs under this regulation or under RCRA. This section explains the reasons for the Agency's decision on this matter. Because this was the only outstanding issue, the Agency is now able to grant final authorization to the State.

A. EPA's regulation

EPA adopted the present regulation at 40 CFR 271.4(a) on May 19, 1980 (see 45 FR 33395, 33465-66, May 19, 1980). The regulation states that any aspect which "unreasonably restricts, impedes or operates as a ban" is deemed inconsistent.

In the preamble discussing § 271.4(a), EPA explained the regulation as follows. The Agency stated that any aspect of the program which operates as a ban on the interstate movement of hazardous waste is automatically inconsistent. The Agency noted that this position was supported by a court decision, *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), which held unconstitutional a statute banning transportation of certain wastes into the State for disposal because it violated the commerce clause of the Constitution. (This discussion is consistent with that in the preamble to the proposed regulation (44 FR 34259, June 14, 1979).)

EPA did not discuss what criteria it would apply in determining whether State programs unreasonably restrict or impede the free movement of hazardous waste. However, it is clear from the regulation that EPA intended "unreasonable restrictions or impediments" to render State programs inconsistent. The question of whether a State provision unreasonably restricts or impedes the free movement of hazardous waste did not arise in any final decision to grant RCRA final authorization until South Carolina's amended statute raised this issue.

B. The Agency's Tentative Decision on South Carolina Authorization

As noted above, EPA tentatively concluded that the South Carolina statute did not render the State program inconsistent under 40 CFR 271.4(a). In reaching this conclusion, the Agency considered all available facts. It appeared reasonably clear from the face of the statute that the fee schedule was not a ban and that it did not operate as a ban. The evidence before the Agency did not indicate that the fee schedule had significantly affected the flow of hazardous waste into the State. However, because the amended statute was a potentially significant change to the State program which might affect authorization under 40 CFR 271.4, the Agency solicited comment on whether the fee schedule unreasonably restricts or impedes the flow of hazardous waste into South Carolina.

C. Public Comment

Public comment, with one exception, supported EPA authorization of the State program. Several commenters did not address the question of the fee schedules but generally stated that South Carolina's RCRA program was supported by adequate legal authority and staffing and therefore deserved authorization. The only land disposal facility in South Carolina known to the Agency to accept out-of-State hazardous waste and to pay the fees at issue also generally supported authorization, but did not address the question raised [sic] by the fee schedule.

Several other commenters who favored authorization argued that the fee schedule was reasonable and justified. They provided a variety of rationales including that the higher fees were appropriate: (1) To discourage land disposal as it is environmentally [sic] the least desirable [sic] form of disposal, (2) to raise money that might be expended to address released [sic] from land disposal units, (3) to discourage land disposal and thereby conserve the State's limited land disposal resources, and (4) to supplement State funds for monitoring compliance at land disposal facilities accepting out-of-State wastes.

The State of South Carolina commented that the one land disposal facility in South Carolina which accepts out-of-State wastes charges \$90.00 per ton for disposal. First, the State noted that the new fee differential of \$5.00 per ton for out-of-State wastes represents but a small percentage of this charge. The State believed that this small amount would not discourage out-of-State generators from using the facility. Second, the State noted that during the period of July to September of 1984 there were 16,848 tons of out-of-State waste disposed at the facility. During the same period in 1985, when the new fee schedule was in place, there were 26,352 tons of out-of-State waste disposed. The State cited this increase as factual proof that the fee schedule has not had any adverse impact on the amount of waste imported into the State. The State reported that fees had been collected at both the \$18.00 rate and at higher rates corresponding to the fees of the States from which the wastes were shipped. Third, the State noted that a fee differential, including rates equivalent to those charged in the shipping State, had existed for several years and that there has been a continuing increase in the volume of wastes imported into the State.

The Hazardous Waste Treatment Council was alone in opposing authorization for South Carolina. The Council did not dispute that the volume of imported waste had in-

creased despite the higher fees. Rather, they believed [16439] that the fee schedule discriminates on its face against interstate commerce and therefore was an unconstitutional and unreasonable restriction on the free flow of waste. The Council argued that: (1) The disparity in fees rendered the program "inconsistent" under RCRA 3006(b) as it did not promote the essential uniformity among hazardous waste programs intended by Congress, (2) the disparity in favor of in-State wastes was unconstitutional and therefore was inconsistent under RCRA 3006(b) and an unreasonable restriction or impediment under § 271.4(a), and (3) discriminatory statutes will frustrate RCRA objectives for a national market for development of proper treatment and disposal [sic] practices.

The Council stated that in promulgating 40 CFR 271.4, EPA had adopted a constitutional test to determine what is an unreasonable restriction and impediment. Therefore, they argued that the unconstitutional statute violated § 271.4(a). They also argued that it would be too difficult to assess whether there is in fact a significant discrimination on a case-by-case basis.

EPA believes that these are the substantive comments relating to the fee schedule and the Agency's decision. These and other comments are addressed in this notice and in a separate comment and response document that is available from EPA Region IV (address listed at the front of this notice).

D. Application of § 271.4(a) to South Carolina's Fee Schedule

EPA carefully evaluated the above comments in determining whether the South Carolina fee schedule was an unreasonable restriction or impediment to the free movement of hazardous waste.

The Agency has determined that in applying § 271.4 (a) to State laws and regulations, EPA should look to

whether the State provision in fact has or is likely to have a significant adverse effect on the follow [sic] of hazardous waste into or out of the State. Thus, the unreasonableness of the restriction or impediment under § 271.4(a) should be measured by the impact of [sic] likely impact on the actual flow of waste. In applying this test, EPA will look to all relevant factors. The Agency will primarily focus on any available evidence on the quantities of wastes that are imported and exported.

The Agency believes that this test is a reasonable interpretation of its regulation and does not conflict with section 3006 of RCRA. Section 271.4(a) does not by its terms prohibit any restrictions or impediments, only those that are unreasonable. Reasonable restrictions or impediments can logically include those that do not significantly decrease the flow of hazardous waste. Therefore, EPA does not agree that *any* disparity in treatment between in-State and out-of-State wastes is *per se* unreasonable. Contrary to the statement by the Hazardous Waste Treatment Council, the preamble adopting this regulation did not state that EPA was relying on the Constitutional test for impermissible [sic] restraints on interstate commerce as the basis for finding restrictions or impediments unreasonable. The Agency is not required to adopt the Constitutional test for impediments or restrictions in interpreting its own regulations, and declines to do so here.

EPA also believes that its interpretation of the regulation accords with RCRA. RCRA section 2006 [sic] requires EPA to approve State programs unless it finds they are; [sic] (1) Not equivalent, (2) not consistent, or (3) lacking adequate enforcement authority. To be equivalent, States must adopt a set of basic statutes and regulations that are equivalent to EPA's. In addition, States may adopt requirements which are more stringent or different than EPA's authority. More strin-

gent requirements are expressly permitted by RCRA section 3009. These requirements may have some adverse effect on interstate commerce. Different requirements are permissible if they are not inconsistent with the Federal program and approved State programs. Authorized States have adopted many State requirements that are unlike the requirements of other States and which, in some cases, have an effect on the flow of wastes. The Agency does not believe that the mere existence of differences or disparities in treatment makes State programs inconsistent *per se*. Congress expected that States would not have identical programs and recognized the importance of allowing States to experiment with different requirements. Congress gave EPA the authority to interpret the term "consistent"; the Agency has interpreted the term in § 271.4 to prevent unreasonable restrictions or impediments in authorized programs. Nothing in RCRA section 3006(b) or any other section of RCRA requires the Agency to adopt the Constitutional test as the test for consistency or unreasonable restrictions or impediments.

The Agency does not believe that higher fees for out-of-State wastes or other discriminatory practices should be encouraged. EPA is concerned that such fees may discourage wastes from going to the most appropriate facility for treatment or disposal.

However, it appears that South Carolina's fee schedule does not have a significant adverse effect on the flow of hazardous waste into or out of the State. All available evidence supports this conclusion. The fact that the fee differential is small in most cases indicates that the out-of-State fee probably will not restrict a significant volume of waste. Moreover, the fact that the volume of out-of-State wastes increased significantly after the higher fees were imposed suggests that there is not a significant adverse impact on the flow of wastes. The fees clearly do not operate as a ban in this case. In addition, some fees

were collected at the higher rate based on the fees of other States. Finally, the volume of wastes imported into the State has increased over the years despite a fee differential which included fees based on those in the State of origin. Although it is unknown how much more waste might have entered South Carolina if there were no fee differential, there is no information to suggest that a significant volume might be affected. The Agency disagrees that this test (which looks to the facts of each case) is too difficult to apply.

Several comments related to the reasons for the State's adoption of the fee schedule and one addressed the concern that discriminatory practices would frustrate RCRA objectives for a national market for proper treatment and disposal practices. EPA acknowledges that the State offered several reasons for the fee differential. However, the Agency believes that the reasons for the adoption of the fee or any purported benefits are not generally relevant to the question of reasonableness of the impediment or restriction. If a provision has little or no impact on the flow wastes, EPA does not believe that the actual motives or benefits resulting from the provision should preclude authorization. EPA is also concerned that different provisions for in-State and out-of-State wastes may frustrate the best possible treatment and disposal of wastes. As noted above, RCRA intended that State programs be generally uniform for purposes of encouraging proper treatment and disposal and EPA has interpreted this consistency requirement to deny authorization where restrictions or impediments are unreasonable. It does not require EPA to deny authorization merely because in-State and out-of-State wastes are regulated somewhat differently by the State. In any event, there is no evidence that proper [46440] treatment or disposal is adversely affected by this statute; the volume of wastes into South Carolina has increased.

In applying this facts and circumstances test, EPA is aware that circumstances may change over time. The

Agency will therefore periodically reassess provisions which may unreasonably impede the flow of wastes, including this fee schedule of South Carolina. In addition, any provisions adopted by States seeking authorization and which impose or result in restrictions or impediments on the flow of wastes will be subjected to careful scrutiny. If an authorized State adopts restrictions or impediments that may affect the flow of hazardous wastes, EPA may find that such changes are significant revisions to the States' program and provide public notice and comment under § 271.21 on their potential impacts on interstate transportation of wastes. If the restrictions or impediments are found to be unreasonable, they would be grounds for withdrawal of the authorized program under § 271.22.

For the reasons discussed above, EPA has concluded that South Carolina's fee schedule is not an unreasonable impediment or restriction on the flow of waste into the State and that authorization is not precluded by § 271.4 (a). Nevertheless, the Commissioner of the South Carolina Department of Health and Environmental Control has informed the Agency that he will recommend to the South Carolina Legislature that it repeal that aspect of the fee schedule which imposes higher fees based on rates charged by the State of origin. EPA supports this effort.

South Carolina is not authorized by the Federal government to operate the RCRA program on Indian lands and this [sic] authority will remain with EPA.

Final authorization is hereby granted to South Carolina to operate its hazardous waste management program in lieu of the Federal program subject to the limitation on its authority by the Hazardous and Solid Waste Amendments of 1984 (Pub.L. 98-616, November 8, 1984). South Carolina now has the responsibility for permitting treatment, storage, and disposal facilities within its borders and carrying out the other aspects of the RCRA program. South Carolina also has primary enforcement

authority, although EPA retains the right to conduct inspections and make information requests under section 3007 of RCRA and to take enforcement action under sections 3008, 3013, and 7003 of RCRA.

Prior to the Hazardous and Solid Waste Amendments (HSWA) amending RCRA, a State with final authorization administered its hazardous waste program entirely in lieu of EPA. EPA's regulations no longer applied in the authorized State, and EPA could not issue permits for any facilities the State was authorized to permit.

Now, however, under section 3006(g) of RCRA, 42 U.S.C. 6226(g), the new Federal requirements and prohibitions imposed by the HSWA take effect in authorized States at the same time as they take effect in non-authorized States. EPA is directed to carry out those requirements and prohibitions, including the issuance of full or partial permits, in authorized States until the State is granted authorization to do so.

As a result of HSWA, there will be a dual State-Federal regulatory program in South Carolina. To the extent the authorized State program is unaffected by the HSWA, the State program will operate in lieu of the Federal program. EPA will administer and enforce the portions of the HSWA in South Carolina until the State receives authorization to do so. Among other things, this will entail the issuance of Federal RCRA permits for those areas in which the State is not yet authorized. Once the State is authorized to implement a HSWA requirement or prohibition, the State program in that area will operate in lieu of the Federal program. Until that time the State will assist EPA's implementation of the HSWA under a Cooperative Agreement.

Federal HSWA requirements that are more stringent than the State's program apply in South Carolina. Any State requirement that is more stringent than a Federal HSWA provision also remains in effect. (South Carolina

is not being authorized now for any requirement implementing the HSWA.)

EPA has published a Federal Register notice that explains in detail the HSWA and its effect on authorized States. Refer to 50 FR 2872-28755, [sic] July 15, 1985.

Compliance With Executive Order 12291

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Certification Under the Regulatory Flexibility Act

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this authorization will not have a significant economic impact on a substantial number of entities. This authorization effectively suspends the applicability of certain Federal regulations in favor of South Carolina's program, thereby eliminating duplicative requirements for handlers of hazardous waste in the State. It does not impose any new burdens on small entities. This rule, therefore, does not require a regulatory flexibility analysis.

List of Subjects in 40 CFR Part 271

Hazardous waste, Indian lands, Reporting and record-keeping requirements, Waste treatment and disposal, Intergovernmental relations, Penalties, Confidential business information.

Authority: This notice is issued under the authority of sections 2002(a), 3006, and 7004(b) of the Solid [sic] Waste Disposal Act as amended 42 U.S.C. 6912(a), 6926, 6974(b), and EPA Delegation 8-7.

Dated: November 5, 1985

Jack E. Ravan,

Regional Administrator.

[FR Doc. 85-26814 Filed 11-7-85; 8:45 am]

[SEAL]

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460
Dec. 23, 1988

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Policy Regarding Hazardous Waste Management Capacity and RCRA Consistency Issues
To: Regional Administrators

In recent months we have focused on two parallel, but overlapping, issues in the hazardous waste management area. One issue has been the development of guidance for the State hazardous waste capacity assurance process called for by Section 104(c)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The other has been the issue of EPA's approach to State actions which may be inconsistent with the federal Resource Conservation and Recovery Act program.

This past June a task force on these RCRA consistency and CERCLA capacity issues presented their findings to me. In addition, we have now completed our guidance to the States for the CERCLA capacity assurance process. Based on an evaluation of the findings and guidance, I now want to present to you EPA's policy in the area of RCRA consistency and CERCLA capacity assurance.

First, we will rely on the CERCLA process as our primary vehicle for ensuring that States have adequate capacity to manage their hazardous wastes. As our CERCLA capacity guidance indicates, the States must provide EPA with a good knowledge of their current and projected waste amounts and management practices, including correlation of imports and exports between States; description of waste minimization programs; and

discussions of laws and regulations which may affect the state's ability to manage wastes. EPA must approve these State assurances in order for EPA to provide Superfund remedial actions in a State after October 17, 1989.

Secondly, the Regions should use the procedures for withdrawal of authorized State RCRA programs in the case of failure to use the RCRA uniform manifest system, or for unreasonable restrictions on interstate waste movements. The CERCLA capacity assurance process should be used as an initial response to State actions which prohibit waste management within State boundaries without environmental justification. States may be able to resolve issues related to such actions themselves during the interstate discussions that the CERCLA process will foster. The Regions should, therefore, decide whether to initiate proceedings to withdraw State RCRA programs for prohibitory actions after determining that the CERCLA process has proven ineffective.

I believe the above dual approach to be a positive one allowing us to work within the legal authority provided, and to assist States in developing needed waste management capacity.

/s/ Lee M. Thomas
LEE M. THOMAS

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC.,
v. *Petitioner,*

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA;
ALABAMA DEPARTMENT OF REVENUE; and JAMES
M. SIZEMORE, JR., COMMISSIONER OF THE ALABAMA
DEPARTMENT OF REVENUE,

Respondents.

On Writ of Certiorari to the
Supreme Court of Alabama

BRIEF OF THE
NATIONAL GOVERNORS' ASSOCIATION,
COUNCIL OF STATE GOVERNMENTS,
NATIONAL CONFERENCE OF STATE LEGISLATURES,
NATIONAL ASSOCIATION OF COUNTIES,
INTERNATIONAL CITY/COUNTY MANAGEMENT
ASSOCIATION, NATIONAL LEAGUE OF CITIES,
AND U.S. CONFERENCE OF MAYORS
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a state law that (1) imposes a substantial in-state burden corresponding to the burden of a higher disposal fee imposed on out-of-state hazardous waste, and (2) confers a substantial out-of-state benefit corresponding to the in-state benefit of a lower disposal fee, is consistent with the Commerce Clause.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-471

CHEMICAL WASTE MANAGEMENT, INC.,
Petitioner,

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA;
ALABAMA DEPARTMENT OF REVENUE; and JAMES
M. SIZEMORE, JR., COMMISSIONER OF THE ALABAMA
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INTERNATIONAL CITY/COUNTY MANAGEMENT
ASSOCIATION, NATIONAL LEAGUE OF CITIES,
AND U.S. CONFERENCE OF MAYORS
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI CURIAE

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. Their concerns include preserving the authority of States to respond in responsible and appropriate ways to the acute problems posed by a national shortage of hazardous waste disposal sites. By accepting hazardous waste generated throughout the United States, Alabama has shown itself to be a responsible participant in the interstate market for the commercial disposal of hazardous waste. Reversal of the judgment below would prevent Alabama from sharing, in a constitutionally permissible manner, the burdens as well as the benefits arising from its unique national role. *Amici* accordingly submit this brief to assist the Court in its resolution of this case.¹

STATEMENT

Amici adopt respondents' statement of the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Alabama is a responsible actor in the interstate market for the commercial disposal of hazardous waste. The EPA has identified seventy-four counties in thirty-six States that have potential hazardous waste disposal sites. See J.A. 103-105. The trial court found that "hazardous waste landfills can be designed and engineered to operate in practically every state." Pet. App. 57a. Nevertheless, most States are absent from the interstate market for

¹ The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Court.

landfill disposal of hazardous wastes. Alabama is one of only sixteen States that have commercial hazardous waste landfills, and most of the other fifteen States participate in the market on a much smaller scale. See Jeffrey D. Smith, *Hazardous Waste Landfill Facility Information*, EI Digest, Mar. 1992, at 26-27 (Table 1) (hereinafter "EI Digest").

Petitioner Chemical Waste Management's facility at Emelle, Alabama is the largest of the twenty-one commercial hazardous waste landfills located in these sixteen States. See Pet. Br. 8; EI Digest at 26-27 (Table 1). The Emelle facility has a total permitted capacity of 21.4 million cubic yards. Emelle's capacity substantially exceeds the total combined capacity of ten facilities in ten States, and likewise exceeds the total combined capacity of six facilities in three other States. *Id.* The capacity at Emelle is more than double the capacity of a single facility in a fourteenth State. The permitted landfill capacity for hazardous wastes in Alabama is matched by only one State, California, which has three facilities with a total permitted capacity of 22.5 million cubic yards. See EI Digest at 26-27 (Table 1).²

These capacity statistics in fact understate the extent of Alabama's role in the interstate market. As of 1990, the United States reported that Emelle is "the ultimate depository for over one third of the

² Alabama's prominent place among the handful of States that play a major role in this interstate market is likely to continue. Emelle has a very high percentage of the available undeveloped acres at the twenty-one existing facilities. Although data are not reported for four facilities, the 1,725 undeveloped acres at Emelle are more than twice the total of 824.8 undeveloped acres at twelve facilities in eleven States. See EI Digest at 26-27 (Table 1).

waste materials shipped off-site from Superfund [cleanup] sites." Pet. Br. 8. The trial court found that Emelle "received two years ago approximately 17% of all hazardous wastes commercially landfilled in the United States." Pet. App. 58a. Emelle is one of only eight landfills in seven States that are licensed to dispose of electrical equipment containing polychlorinated biphenyls (PCBs) and other PCB wastes. Brief for *Amici Curiae* American Iron and Steel Institute *et al.* in Support of Petition at 8 & n. 5.

As the respondents demonstrate in their Statement of the Case, and as the United States recognizes (Br. at 19), Alabama has well-founded health and safety concerns arising from the landfill disposal at Emelle of hazardous wastes that pose serious environmental and health risks. The large volumes of hazardous wastes that are landfilled each year at Emelle heighten the State's concern about these risks. In 1985, 341,000 tons of hazardous waste were deposited at Emelle. By 1989 this had increased to 791,000 tons. J.A. 23.

Notwithstanding a 1990 statute establishing an "additional fee" for out-of-state hazardous wastes, Alabama continues to play a responsible role in the interstate market. The 1990 statute, which CWM challenges here, imposes "an additional fee . . . of \$72.00 per ton" on "waste and substances which are generated outside of Alabama and disposed of at a commercial site for the disposal of hazardous waste or hazardous substances in Alabama." Ala. Code § 22-30B-2(b). Since the enactment of this statute, the high percentage of out-of-state hazardous wastes deposited at Emelle has remained constant.³ The

³ The total amount of hazardous waste deposited at Emelle decreased to 648,000 tons in 1990 and to 290,000 tons in 1991.

trial court found that, prior to the imposition of the additional fee, "[e]ighty-five to ninety percent of the tonnage permanently buried at Emelle is from out-of-state." Pet. App. 58a. From July 15, 1990, the effective date of the statute, through December 1990, 89.25% of the hazardous wastes deposited at Emelle were from out-of-state sources. For calendar year 1991, 88.66% of the hazardous wastes were from out-of-state sources. *High Court to Consider Extra Tax on Tainted Waste*, Montgomery Advertiser, Mar. 31, 1992, at 5A.

The validity of the additional fee does not turn, as petitioner and the United States argue, on a simplistic analysis of the statute as discriminating on its face between out-of-state hazardous waste generators and in-state hazardous waste generators. Any allocation of the benefits and burdens on in-state and out-of-state interests must also take into account Alabama's determination to authorize hazardous waste landfills. Alabama imposes on its citizens all the burdens of providing a permanent site for the disposal of hazardous waste that a great majority of the States do not impose on their citizens. This sub-

EI Digest at 26 (Table 1). This decrease, however, does not diminish Alabama's role as a responsible participant in the interstate hazardous waste disposal market. Even though the reduction in the volume of hazardous waste deposited at Emelle may be attributable in part to the additional fee, it is also attributable to other factors, such as the current recession and the related decline in generation of hazardous wastes. See EI Digest at 24. There were, for example, significant reductions in the volume of deposits at two other CWM commercial hazardous waste landfills from 1990 to 1991. In that one year period, volume at a CWM facility in Indiana declined from 200,000 to 100,000 tons, and volume at a CWM facility in Illinois declined from 240,000 tons to 67,000 tons. *Id.*

stantial in-state burden corresponds to the burden imposed by the additional fee on out-of-state interests. There is a similar correspondence between in-state and out-of-state benefits. Although in-state hazardous waste generators are not subject to the additional fee, out-of-state interests are accorded the benefit of avoiding the problems of disposing of the immense volume of hazardous wastes that are land-filled at the Emelle facility.

Amici submit that the additional fee is consistent with the Commerce Clause because Alabama's provision for hazardous waste landfill (1) imposes a substantial in-state burden that corresponds to the burden of the higher disposal fee imposed on out-of-state wastes, and (2) confers a substantial out-of-state benefit that corresponds to the in-state benefit of a lower disposal fee. The burdens imposed on the citizens of Alabama of providing a permanent site for the disposal of hazardous wastes justify the corresponding burden imposed on out-of-state interests by the differential fee. This scheme thus comports with the Court's Commerce Clause jurisprudence, which permits States to regulate the commercial disposal of hazardous wastes on terms that impose corresponding burdens on in-state and out-of-state interests.

ARGUMENT

THE "ADDITIONAL FEE" IS VALID BECAUSE STATE LAW IMPOSES A SUBSTANTIAL IN-STATE BURDEN THAT CORRESPONDS TO THE BURDEN IMPOSED ON OUT-OF-STATE WASTES, AND CONFERS A SUBSTANTIAL OUT-OF-STATE BENEFIT THAT CORRESPONDS TO THE IN-STATE BENEFIT OF A LOWER DISPOSAL FEE

A. The Validity Of State Laws Under The Dormant Commerce Clause Turns On A Careful Assessment Of The Burdens And Benefits Allocated To Both In-State And Out-Of-State Interests

This Court has long recognized that the dormant Commerce Clause imposes limits on state legislative power in the interest of promoting a national economic union. *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-39 (1949); *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829). In determining these limits, the Court draws a fundamental distinction between state laws that burden interstate commerce and state laws that discriminate against interstate commerce. State laws that evenhandedly impose burdens on both in-state and out-of-state interests are classified as "burdensome." State laws are said to be "discriminatory" where there is little or no burden on in-state interests that corresponds to any burden imposed on out-of-state interests. See, e.g., *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 & n.12 (1992); *Maine v. Taylor*, 477 U.S. 131, 138 (1986).⁴

⁴ This Court has recognized that the traditional deference accorded to state laws that burden both in-state and out-of-state interests is not warranted where a disproportionate burden is imposed on out-of-state interests. Compare *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 675-76 (1981) (Powell, J., judgment of the Court) and *Raymond*

The distinction between state laws that burden or discriminate against interstate commerce was originally stated by Justice (later Chief Justice) Stone. It rests on an assessment of the operation of state political processes and in particular on an analysis of (1) the allocation of burdens between in-state and out-of-state interests, and (2) the distribution of benefits between in-state and out-of-state interests. See *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 n.2 (1945); *South Carolina Highway Department v. Barnwell Brothers*, 303 U.S. 177, 184 n.2, 187 (1938).

As a general rule, state laws that burden interstate commerce are valid if they serve legitimate state interests and if the burdens imposed on interstate commerce are not "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). State laws that discriminate against interstate commerce, however, are subject to a more demanding level of scrutiny and are invalid "unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Wyoming v. Oklahoma*, 112 S. Ct. at 800. Moreover, "when the state statute amounts to simple economic protectionism," this Court has applied "a 'virtually *per se* rule of invalidity.'" *Id.* (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

Motor Transportation, Inc. v. Rice, 434 U.S. 429, 444 n.18 (1978) (both rejecting traditional presumption of validity of state highway safety laws that disproportionately burdened out-of-state interests) with *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472-73 (1981) (deference to state environmental regulations imposing burdens on both in-state and out-of-state interests).

B. The General Rule That State Laws Imposing Burdens Exclusively On Out-Of-State Interests Are Invalid Does Not Apply To The Additional Fee

As a general matter, the distinction between burdensome and discriminatory state laws is salutary. Heightened scrutiny of state laws that discriminate against interstate commerce is warranted because such laws frequently threaten the free interstate market. When this Court has held state laws invalid because they were either discriminatory on their face or in their effect, the laws exclusively burdened out-of-state interests and reserved all benefits for in-state interests. In these cases, the States had attempted to promote their parochial interests at the expense of their sister States and had effectively opted out of the interstate market.

In *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), for example, this Court held that a facially discriminatory New Jersey law prohibiting the importation of most forms of solid waste violated the Commerce Clause. All of the burdens of the state law fell on out-of-state interests that were completely barred from access to New Jersey landfills, and no burdens were imposed on New Jersey citizens. All of the benefits of conserving scarce landfill space, minimizing pollution problems, and reducing waste disposal costs were reserved for New Jersey citizens, and no benefits were accorded to out-of-state interests. The overtly discriminatory Oklahoma statute held invalid in *Hughes v. Oklahoma*, 441 U.S. 332 (1979), also imposed burdens exclusively on out-of-state interests and reserved benefits exclusively for in-state interests. The Oklahoma prohibition on exporting natural minnows imposed all of its burdens on indi-

viduals who wished to use them outside of the State and reserved the benefit for those fishing in Oklahoma.

Although the North Carolina statute held invalid in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), was discriminatory in effect and not on its face, this statute, like those in *Philadelphia v. New Jersey* and *Hughes v. Oklahoma*, also imposed burdens exclusively on out-of-state interests and reserved benefits exclusively for in-state interests. This Court found that the burdens of compliance with North Carolina's apple grading standards fell solely on Washington apple growers. 432 U.S. at 351. Similarly, the benefits of the State's apple grading standards flowed exclusively to in-state apple growers because out-of-state apples would be down-graded to the standards satisfied by locally-grown apples. *Id.* at 351-52.

The additional fee is easily distinguishable from the discriminatory statutes held invalid in these and other cases. In sharp contrast to the state laws in *Philadelphia v. New Jersey*, *Hughes v. Oklahoma*, and *Hunt v. Washington State Apple Advertising Comm'n* that imposed burdens exclusively on out-of-state interests and reserved benefits exclusively for in-state interests, Alabama's provisions for the commercial disposal of hazardous waste impose burdens on both in-state and out-of-state interests and also confer a substantial benefit on out-of-state interests.⁵

⁵ As discussed above, discriminatory state laws are subject to heightened scrutiny and usually invalidated. This Court has recognized, however, that state laws imposing burdens exclusively on out-of-state interests may be valid. See *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988); *Maine v. Taylor*, 477 U.S. at 148 n.19; *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 26, 43 (1980). See also *Mintz v. Baldwin*,

289 U.S. 346 (1933). *Maine v. Taylor*, for example, upheld an overtly discriminatory Maine statute prohibiting the importation of live baitfish.

The quarantine cases likewise confirm the States' power to impose burdens exclusively on out-of-state interests to prevent exacerbation of existing in-state problems even when the State has not imposed any corresponding burden on in-state interests to solve these problems. Although the United States broadly asserts that the "quarantine statutes . . . are in fact evenhanded because all traffic . . . is prohibited," it concedes that some of the quarantine laws were discriminatory because the "cases do not explicitly search for an in-state equivalent to the discriminatory statutes." United States Br. at 24 & n.30. Of course, in the absence of an in-state burden equivalent to the out-of-state burden imposed by the quarantine's prohibition against importation of out-of-state items, the quarantine laws were in fact discriminatory.

To the extent that the quarantine cases noted in *Philadelphia v. New Jersey*, 437 U.S. at 628-29, involved statutes that were discriminatory because they imposed burdens exclusively on out-of-state interests, this Court's statement that the quarantine laws "simply prevented traffic in noxious articles, whatever their origin" (*id.* at 629) appears to be an overstatement. Many state laws, like the New York statute at issue in *Mintz v. Baldwin*, 289 U.S. 346 (1933), did not impose the same restrictions on in-state and out-of-state traffic. See, e.g., *Mintz v. Baldwin*, 2 F. Supp. 700, 715 (N.D.N.Y. 1933) (Cooper, J., dissenting) (discussing more burdensome certification requirements imposed on out-of-state cattle than in-state cattle), *aff'd*, 289 U.S. 346 (1933).

The analogy between discriminatory state laws prohibiting the importation of diseased fish and diseased cattle and the additional fee imposed on out-of-state hazardous wastes is carefully drawn in respondents' brief and is not repeated here.

C. Alabama's Regulation Of Hazardous Waste Does Not Burden Out-Of-State Interests Exclusively, And The Additional Fee Is Valid Because State Law Imposes Corresponding Burdens On In-State And Out-Of-State Interests

1. *Petitioner's Analysis of the Additional Fee Is Superficial and Incomplete*

Petitioner and the United States focus exclusively on the allocation of burdens between in-state and out-of-state waste generators. With respect to hazardous waste generators, the statute is admittedly discriminatory on its face: it imposes a \$72 additional fee for imported hazardous wastes. Although petitioner and the United States would have this Court decide the case solely on the basis of the additional fee and the "discriminatory" label, the actual distribution of benefits and burdens is more complex. Catchwords and labels are not a substitute for analysis of the actual distribution of benefits and burdens between in-state and out-of-state interests made by Alabama's provisions for the commercial disposal of hazardous wastes. See *Henneford v. Silas Mason Co.*, 300 U.S. 577, 586 (1937). Looking beyond the narrow impact of the additional fee on waste generators, it is apparent that state law does not impose burdens exclusively on out-of-state interests. The State's provisions for commercial hazardous waste landfills are not discriminatory in fact because (1) they impose a substantial in-state burden that corresponds to the burden of the higher disposal fee imposed on out-of-state wastes, and (2) they confer a substantial out-of-state benefit that corresponds to the in-state benefit of a lower disposal fee.

Petitioner and the United States, however, view this case as raising questions about Alabama's power

to favor in-state hazardous waste generators against out-of-state hazardous waste generators, to insulate in-state businesses from out-of-state competition, or to reserve the Emelle facility for the benefit of its own citizens. Viewed in this superficial fashion, the additional fee is "discriminatory." This analysis, however, is fundamentally flawed.

There is simply no evidence in the record to support the conclusion that the differential fee was enacted either at the behest of or for the benefit of Alabama hazardous waste generators.⁶ Cf. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. at 352 (overwhelming evidence that restrictions on imported apples were to serve the interests of in-state apple growers). Similarly, given the vast capacity of the Emelle facility,⁷ there is no reason to believe that the State was acting to reserve limited hazardous waste disposal capacity for in-state hazardous waste generators. Petitioner's focus on the effect of the additional fee on waste generators is incomplete because it ignores the fact that Alabama has imposed other significant burdens on all of its citizens by permitting

⁶ If this Court were to adopt Professor Regan's powerful argument that the dormant or negative side of the Commerce Clause should prohibit only state laws whose purpose is "to advantage local actors at the expense of their foreign competitors," the differential fee would clearly be valid. Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1095 (1986) (emphasis in original). There is no evidence that the purpose of the differential fee is to confer any advantage on in-state hazardous waste generators at the expense of their foreign competitors, out-of-state hazardous waste generators.

⁷ The trial court found that "there is capacity at Emelle for another 100 years of operation." Pet. App. 58a.

the operation of a commercial hazardous waste disposal facility within its borders, and that these burdens correspond to the burden of the additional fee imposed on out-of-state generators.

2. Alabama's Authorization of Commercial Hazardous Waste Landfills Imposes Substantial In-State Burdens

By permitting the operation of a commercial hazardous waste landfill, Alabama imposes substantial health and safety risks on its citizens.⁸ Given the trial court's finding that "hazardous waste generated in Alabama is just as dangerous as such waste generated in other states" (Pet. App. 86a), *amici* do not dispute the limited propositions, advanced by petitioner, that (1) the monetary costs of cleaning up problems created by the disposal of hazardous waste should be based on the volume of wastes deposited and that (2) a nondiscriminatory fee ensures that in-state and out-of-state waste generators will pay a proportional share of clean-up costs based on the volume of hazardous wastes deposited at Emelle. See Pet. Br. at 19, 29 n. 19.

These limited propositions, which are the linchpin of petitioner's argument, do not address Alabama's more fundamental concerns. The Alabama legislature correctly recognized that the disposal of hazardous wastes imposes on Alabama citizens the burdens of

⁸ As set out in respondents' Statement of the Case, the record demonstrates that the disposal of hazardous wastes at the Emelle landfill poses serious threats to both human health and the environment and that there are significant questions whether waste disposal technology and federal standards provide adequate safeguards against either the short-term or the long-term risks.

potential environmental and health problems that simply cannot be "cleaned up" or "cured" by remedial expenditures. Alabama has thus imposed on its citizens substantial burdens that the majority of the States have not.⁹ The risks that the Emelle site and the surrounding area may become permanently polluted or that the health of Alabama citizens may be impaired in ways or to an extent that no individual would accept voluntarily in exchange for money damages are borne exclusively by the citizens of Alabama. Even assuming that the federal regulatory scheme provides the best possible current guarantee of health and safety, the risk that the hazardous waste landfill at Emelle may prove to be another Times Beach or Love Canal is borne by the citizens of Alabama.¹⁰ The State may properly take into account the wide range of health and environmental burdens that are now and may ultimately be imposed on its citizens. See *Maine v. Taylor*, 477 U.S. at 148 (States have "a legitimate interest in guarding

⁹ When it imposed the additional fee, the legislature expressly found that:

As the site for the ultimate burial of hazardous wastes and substances, the state incurs a permanent risk to the health of its people and the maintenance of its natural resources that is avoided by other states which ship their wastes to Alabama for disposal.

Ala. Act No. 90-326 § 1(d); Ala. Code § 22-30B-1(d) (Pet. App. at 103a).

¹⁰ If, contrary to the record (*see note 8 supra*), one assumes that hazardous waste disposal technology is "fail safe," it is nonetheless the case that Alabama already has the burden of a negative reputation as the location of one of the nation's principal hazardous waste disposal facilities. This burden, which is analogous to the diminution of value of property located next to a noxious use, is substantial.

against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible").

The in-state burden of potential environmental and health problems that cannot be cured by remedial expenditures, while not easily measured in dollars like the out-of-state burden of the additional fee, is nonetheless substantial.¹¹ This burden on the citizens of Alabama exists regardless of the size of the existing pool of funds that might be used to alleviate health and environmental problems caused by a major disaster and regardless whether there is recourse to hazardous waste generators for additional funds. Thus, suggestions that there may be adequate remedial funds and that federal law ensures equal recourse to in-state and out-of-state hazardous waste generators for additional funds (Pet. Br. at 5, 34-35) do not address the permanent, persistent health and environmental problems that will remain long after the remedial actions are completed.

If in-state and out-of-state hazardous waste generators paid the same nondiscriminatory disposal fee, then the burdens of funding efforts to remedy environmental and health problems would be directly

¹¹ As a matter of common sense, the "NIMBY" (not-in-my-backyard) syndrome confirms the substantial in-state burden of disposing of out-of-state hazardous wastes. Although the need for safe disposal of hazardous wastes is widely acknowledged, most individuals would prefer that commercial hazardous waste landfills like Emelle be located as far away as possible. The substantial in-state burden of a hazardous waste landfill is demonstrated by the trial court's finding that since the effective date of RCRA in 1980, "only one additional hazardous waste landfill has been permitted." Pet. App. at 57a.

proportional to the volume of hazardous wastes generated by in-state and out-of-state sources. Although both in-state and out-of-state hazardous waste generators (and indirectly in-state and out-of-state citizens) would bear these remedial burdens in proportion to their contribution to the problem, other burdens would not be allocated proportionately between in-state and out-of-state sources. Alabama citizens would bear all of the substantial burdens of environmental and health problems that cannot be "cleaned up" or "cured" by remedial expenditures. The additional fee is compensation for locating a potential Times Beach or Love Canal—an analogy that fully accords with public perceptions—in Alabama as opposed to locating the facility in another State.¹²

3. Corresponding In-State and Out-Of-State Burdens and Benefits

The correspondence between the out-of-state burden (\$72 additional fee) and the in-state burden (environmental and health problems that cannot be remedied by subsequent expenditures)¹³ is demonstrated in

¹² The purpose of the additional fee is not to create a fund for remedying environmental and health problems that may arise at commercial hazardous waste landfills. The proceeds of the additional fee are not paid into any special trust fund and are paid instead into the State's general treasury. Ala. Code § 22-30B-3 (Pet. App. 107a-108a). Since the proceeds of the additional fee are not devoted to the costs of any clean-up, there is no merit to the argument (Pet. Br. at 19) that it imposes a disproportionate share of the costs of cleaning up Emelle on out-of-state hazardous waste generators. The additional fee is better understood as compensation for the health and environmental burdens that will be borne in perpetuity by the citizenry of Alabama.

¹³ In comparing in-state and out-of-state burdens, this Court has not imposed any requirement that the burdens must be

part by the fact that the establishment of the additional fee in 1990 did not change the high percentage of out-of-state hazardous wastes deposited at Emelle. See discussion *supra* at 4-5. The out-of-state burdens and the in-state burdens are logical trade-offs between exporters and importers of hazardous wastes.¹⁴

Just as Alabama law imposes corresponding out-of-state and in-state burdens, it also accords substantial out-of-state benefits corresponding to the in-state benefit of the additional fee. The thirty-four States that do not have commercial hazardous waste landfills are freed from the problems of disposing of the hazardous wastes that are landfilled in Alabama at the Emelle facility. These thirty-four States, as well as many of the fifteen States that have only limited

exactly the same kind or imposed on identical out-of-state and in-state actors. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 472-73 (balancing benefits conferred on in-state pulpwood producers and burdens imposed on in-state dairies and milk retailers against burdens imposed on out-of-state producers of plastic resins). Such a requirement is unnecessary because the core concern is whether there is an in-state burden adequate to ensure that the state political process has balanced competing interests fairly. Here, the substantial in-state burden is adequate to ensure that Alabama fairly balanced the interest in providing landfills for hazardous wastes against the interest in avoiding substantial health and environmental problems.

¹⁴ The general correspondence of these burdens is confirmed by the recommendation of the National Governors' Association that States be permitted to charge out-of-state waste generators a multiple of the base fee imposed on in-state waste generators. National Governors' Association, *Policy Positions 1991-92* 186 (§ D-17.8 *Hazardous Waste Management: Interstate Shipments of Hazardous Waste*) (hereinafter "*Policy Positions*").

commercial hazardous waste disposal capacities, shift to Alabama and its citizens the risks that their territory may become permanently polluted and that the health of their citizens may be impaired in ways or to an extent no individual would accept in exchange for money damages.

4. The Additional Fee Is "Demonstrably Justified by a Factor Unrelated to Economic Protectionism"

In imposing the additional fee on out-of-state hazardous wastes, Alabama appropriately balanced the burdens imposed on in-state and out-of-state interests.¹⁵ Although Alabama's provisions for commercial hazardous waste disposal are not discriminatory in fact because they impose burdens on both in-state and out-of-state interests, this Court traditionally subjects statutes that are overtly discriminatory to strict scrutiny. See, e.g., *Maine v. Taylor*, 477 U.S. at 138. As stated earlier this Term in *Wyoming v. Oklahoma*, state laws that discriminate against interstate commerce are invalid "unless the discrimination

¹⁵ The suggestion of *amici* that the state political process did not fairly balance these competing interests, see *Br. Am. Cur. Hazardous Waste Treatment Council* at 8, is mistaken. Although it is true that "a vote against the importation of out-of-state waste is an exceptionally easy vote for a state lawmaker to cast [because] there [is] no significant constituency within the state to protect the 'out-of-staters,'" *id.* (emphasis in original), this statement does not describe the vote actually made by Alabama lawmakers. Alabama lawmakers cast votes in favor of importation of out-of-state wastes, and a vote in favor of permitting hazardous waste disposal is as difficult as the hypothetical vote suggested by *amici* is easy. By voting in favor of permitting the disposal of imported hazardous waste subject to the additional fee, Alabama legislators appropriately balanced the burdens imposed on out-of-state interests against Alabama's burden of environmental and health problems.

is demonstrably justified by a valid factor unrelated to economic protectionism." 112 S. Ct. at 800; see *New Energy Co. v. Limbach*, 486 U.S. at 274. Thus, the "'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." 112 S. Ct. at 800 (quoting *New Energy Co. v. Limbach*, 486 at 273-74).

The Alabama additional fee provision satisfies this demanding standard.¹⁶ As discussed above, it is compensation for all the incurable environmental and health problems that will exist in Alabama long after the site has been "cleaned up" and injuries to health have been "cured."

The additional fee provision does not compromise the fundamental prohibition of the Commerce Clause against economic protectionism. The record does not support any inference that the Alabama additional fee provision is "designed" to aid in-state hazardous waste generators in their competition with out-of-

¹⁶ In cases decided before *Wyoming v. Oklahoma* and *New Energy Co. v. Limbach*, the Court formulated the standard in somewhat different terms and imposed a burden on the States to demonstrate that a discriminatory statute "'serves a legitimate local purpose'" and that "this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. at 138 (quoting *Hughes v. Oklahoma*, 441 U.S. at 336). The additional fee provision also satisfies this standard. It serves the legitimate local purpose of compensating Alabama for assuming the burdens of substantial incurable environmental and health problems. There are no nondiscriminatory alternatives to imposing a differential fee on out-of-state waste generators because a nondiscriminatory disposal fee would force Alabama citizens alone to bear all of these incurable problems.

state hazardous waste generators by imposing differential fees or that the statute is "designed" to conserve the almost unlimited, 100-year capacity of the Emelle facility for in-state interests.

A determination that the Alabama additional fee provision is a valid exercise of state legislative power under the Commerce Clause does not require any departure from this Court's practice of "routinely" striking down discriminatory state laws except in unique circumstances. *New Energy Co. v. Limbach*, 486 U.S. at 274. In most cases, a state law which is discriminatory on its face is also discriminatory in fact because it imposes burdens exclusively on out-of-state interests and does not impose any corresponding burdens on in-state interests. Although the additional fee provision is discriminatory on its face, it is a rare example of a facially discriminatory provision that is not discriminatory in fact because state law imposes corresponding burdens on in-state and out-of-state interests. Thus, for example, recognition of the validity of the additional fee provision is completely consistent with this Court's determination in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) that a state law prohibiting the importation of garbage for disposal in the State's sanitary landfills violated the Commerce Clause. In that case, all of the burdens of the state law fell on out-of-state interests that were completely barred from access to the State's landfills, and no burdens were imposed on in-state interests. *Id.* at 628.

D. The Additional Fee Is Consistent With The Principle That "Our Economic Unit Is The Nation"

The suggestions (Pet. Br. at 38; United States Br. at 14-15) that a judgment sustaining the additional fee would promote "Balkanization" of the economy

and impair the interstate market for the commercial disposal of hazardous wastes are at war with reality. Congress and the National Governors' Association have both found that differential fees for in-state and out-of-state wastes are consistent with the "basic principle that 'our economic unit is the Nation.'" *Hughes v. Oklahoma*, 441 U.S. at 339 (quoting *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537 (1949)). Congress, in a closely analogous context, has determined that state laws imposing higher fees for disposal of out-of-state wastes than for in-state wastes are consistent with the maintenance of a national market. Under one set of the provisions of the Low Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §§ 2021b-2021i, States may impose higher fees on imported low level radioactive wastes.¹⁷ The National Governors' Association has also concluded that differential fees are consistent with interstate cooperation in the disposal of hazardous wastes.¹⁸

Even more significantly, the EPA has determined that South Carolina regulations imposing higher fees for the disposal of out-of-state hazardous wastes than for in-state hazardous wastes are valid under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901 *et seq.*, and the agency's implementing regulations, 50 Fed. Reg. 46437 (1985). See *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 785 n.2 (4th Cir. 1991). The EPA ex-

¹⁷ New York has questioned whether other provisions of this Act are proper exercises of Congress's power under the Commerce Clause. See generally Brief of Petitioner New York State in *New York v. United States* (Nos. 91-543, 91-558, 91-563).

¹⁸ See note 14, *supra*.

pressly found that differential fees imposed on in-state and out-of-state hazardous wastes are "not an unreasonable impediment or restriction on the flow of waste into the State." 50 Fed. Reg. 46440 (1985). A judgment that the Alabama additional fee violates the Commerce Clause would create a significant disparity between South Carolina's and Alabama's hazardous waste disposal programs. If this Court has any doubts about the validity of the additional fee under the Commerce Clause, resolution of the questions (1) whether Congress has authorized the EPA to approve differential fees, and (2) whether the Alabama additional fee is consistent with RCRA and with EPA's implementing regulations, would avoid both this anomaly and a potentially unnecessary decision of the significant constitutional issue raised in this case.¹⁹

The actual effects of Alabama's additional fee are consistent with EPA's determination that South Carolina's differential fees are not "an unreasonable impediment or restriction on the flow of waste into the State." *Id.* The imposition of the additional fee in 1990 has not had any significant effect on the high percentage of out-of-state hazardous wastes deposited at the Emelle facility, and it has not impaired the interstate market for the disposal of hazardous wastes. Moreover, a judgment sustaining the additional fee

¹⁹ The state courts below did not address EPA's approval of South Carolina's differential fees. See Pet. App. at 1a-100a (opinions of the Alabama Supreme Court and the Alabama Circuit Court). The questions are complex. See *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 789-95. In these circumstances, if this Court determines that these questions should be resolved, it would be appropriate to vacate the judgment below and remand for the purpose of making an initial determination.

and recognizing the State's power to match in-state and out-of-state burdens and benefits by assessing an additional fee for the disposal of out-of-state hazardous waste would provide an incentive for the States to maintain existing facilities and to open new facilities. Conversely, a judgment invalidating the additional fee may discourage the States that do not have commercial hazardous waste landfills from entering the market and may encourage States that permit the operation of such facilities to withdraw from the interstate market.²⁰ Recognition of the States' power to balance burdens and benefits by assessing differential fees is particularly important because the federal regulatory program has failed to provide for additional commercial hazardous waste landfills.²¹

²⁰ Given the position of the National Governors' Association that differential fees "compensate importing states for the significant costs, risks, and other burdens they bear as hosts to hazardous waste management facilities used by other states," *Policy Positions* at 186, invalidation of the additional fee may well have more dire consequences for the interstate market. States could, of course, completely prohibit the disposal of both in-state and out-of-state hazardous wastes in landfills. See *Philadelphia v. New Jersey*, 437 U.S. at 626; see also Ray Vaughan, *Toxic Destiny: Changing Alabama's Future as a Hazardous Waste Dumping Ground*, 43 Ala. L. Rev. 75 (1991) (suggesting that if States condemn privately-owned commercial hazardous waste landfills and undertake government operation, they will be able to prohibit completely the importation of out-of-state hazardous wastes).

²¹ This failure has had the effect of saddling States like Alabama, that had large commercial hazardous waste landfills in operation before the enactment of RCRA, with the brunt of the nation's hazardous waste disposal problems. See Brief of South Carolina, *et al.* as *Amici Curiae* in Support of Respondents.

CONCLUSION

The judgment of the Supreme Court of Alabama should be affirmed.

Respectfully submitted,

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